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Supreme Court, U.S.
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In The Supreme Court Of The United States

OCTOBER TERM, 1988

WINCHESTER AND WESTERN RAILROAD COMPANY,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA and
VIRGINIA STATE CORPORATION COMMISSION,
DIVISION OF PUBLIC SERVICE TAXATION,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does ad valorem tax imposed with respect to freight cars of a railroad corporation solely operating track situated in the corporation's State of domicile violate the Due Process Clause of the Fourteenth Amendment or the Commerce Clause when applied to freight cars:

(i) each of which never entered the State of domicile,

(ii) each of which was regularly assigned to freight service for a shipper,

(iii) each of which was identified as having been based at that shipper's plants in one of three specified States,

(iv) each of which hauled

shipments of product for that shipper from one of those plants on identified dates, always being on at least nine total occasions yearly in at least eight calendar months yearly, and

(v) which hauled shipments of product for that shipper to identified customer locations along identified rail routes and through identified jurisdictions,

where (a) in any specific instance of shipment of product to a particular customer loaded on a particular day, freight cars were randomly chosen to make such shipment from that day's available empty freight cars consisting of freight cars of that railroad corporation and freight cars of other

rail carriers, and (b) the corporation did not submit proof of the average number of freight cars used in any particular nondomiciliary State?

Note: The parent company of Petitioner Winchester and Western Railroad Company is Unimin Corporation. The only corporations with an interest in Unimin Corporation are S.C.R.-Sibelco S.A., Quarzwerke GmbH and Les Nouvelles Sablieres de Mol S.A., as well as wholly owned subsidiaries of one or more thereof.

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IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1988

WINCHESTER AND WESTERN RAILROAD COMPANY, Petitioner,

v.

COMMONWEALTH OF VIRGINIA and VIRGINIA STATE CORPORATION COMMISSION, DIVISION OF PUBLIC SERVICE TAXATION, Respondents.

PETITION FOR A
WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

Petitioner Winchester and Western Railroad Company respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of Virginia entered on November 18, 1988, for which a rehearing was denied on January 13, 1989.

OPINIONS BELOW

The opinion of the Supreme Court of Virginia is reported at 374 S.E.2d 66 (1988), and is reprinted in the Appendix hereto, p. 1a, infra.

That opinion affirmed the unreported Opinion and Order of the Virginia State Corporation Commission (the "Commission") entered on January 5, 1988, which is reported in the Appendix hereto, p. 23a, infra.

The unreported denial of Petitioner's Petition for Rehearing by the Supreme Court of Virginia is reprinted in the Appendix hereto, p. 111a, infra.

JURISDICTION

Petitioner seeks review of the decision of the Supreme Court of Virginia entered on November 18, 1988 (pp. 1a and 109a, infra), affirming an Opinion and Order of the Commission entered on January 5, 1988 (p. 23a, infra). The Supreme Court of Virginia denied a timely Petition for Rehearing on January 13, 1989 (p. 111a, infra).

On March 30, 1989, in response to Petitioner's Application No. A-780, Chief Justice Rehnquist ordered that the time for filing this petition for writ of certiorari be extended to and including April 24, 1989.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257.

CONSTITUTIONAL PROVISIONS

AND STATUTES

United States Constitution:

Article I, Section 8:

> Congress shall have Power . . . To regulate Commerce . . . among the several States . . ..

Amendment XIV, Section 1:

> . . . nor shall any State deprive any person of life, liberty or property without due process of law . . ..

Code of Virginia:

> Sec. 58-515. . . . . The State tax on the rolling stock of railway companies doing business in this State shall be the rate of one dollar on each one hundred dollars of the assessed full value thereof . . ..
>
> Sec. 58-524. . . . . Every railroad company doing business in this State shall report on or before the fifteenth day of April, to the State Corporation Commission, its real and tangible personal property of every description

as of the thirty-first day of December preceding, the fair cash value thereof, and the county, city, town or magisterial district in which it is located. . . . .

The report shall classify such property under the following heads:

. . . .

(5) Rolling stock, which shall include all locomotives, of whatever motive power, autocars, cars of every kind and description, and all other equipment which it is reasonably proper to class as rolling stock; provided, that they shall report and be assessed on the average amount of rolling stock habitually used by them in this State.

STATEMENT OF THE CASE

Petitioner is a Virginia incorporated short line railroad operating solely 18 miles of track located entirely within Virginia. Petitioner possess 323 freight cars held under long-term lease. Petitioner is a wholly-owned subsidiary of Unimin Corporation ("Unimin"). Unimin, directly or through a subsidiary, mines, processes and sells silica sand from various locations, including plants in Illinois, Minnesota, New Jersey and Virginia.

In 1982, pursuant to Sections 58-515 and 58-524(5) of the Code of Virginia as then in effect, the Commission assessed ad valorem tax against Petitioner with respect to all 323 freight cars.

Petitioner timely filed an Application for Review and Correction of Taxes on August 11, 1982 (p. 113a, infra). That application raised the constitutional question as follows (p. 116a, infra):

> 11. Such tax is impermissible under the Due Process Clause of the Fourteenth Amendment and the Commerce Clause of the United States Constitution.

That Application for Review and Correction of Taxes also raised a State law issue of improper valuation of freight cars.

In 1983 the Commission again assessed annual ad valorem tax with respect to all Petitioner's 323 freight cars. Petitioner timely filed an Application for Review and Correction of Taxes on July 11, 1983 (p. 121a, infra). Again Petitioner raised the constitutional question, in language

identical to that quoted above (p. 124a, infra). This second Application for Review and Correction of Taxes also raised the valuation issue.

Virginia's 1982 ad valorem tax is based upon rail car usage in 1981, while Virginia's 1983 ad valorem tax is based upon rail car usage in 1982.

Additional facts of record in this case are as follows. In each of 1981 and 1982, more than 237 of Petitioner's specifically identified freight cars never entered Virginia. Of those freight cars, almost all were specifically assigned to haul sand from a plant owned by Unimin in one of the States of Illinois, Minnesota or New Jersey. In each of those years, 237 specifically identified freight cars of that group regularly and continuously hauled sand between a Unimin plant in

Illinois, Minnesota or New Jersey, and the various customers of those of those plants. The customers of those plants and their locations were identified of record.

The number of trips taken by each of those 237 freight cars from the applicable non-Virginia Unimin plant to a customer, and the date each trip was commenced, is specified in the record. Each such freight car made at least nine total trips in a year, and was dispatched on a trip from a Unimin plant in Illinois, Minnesota or New Jersey during at least eight different months.

Petitioner identified of record the rail routes traveled from the respective plants in Illinois, Minnesota and New Jersey to the various Unimin customers, and the States

through which those routes carried the freight cars. When each of those 237 freight cars was dispatched from a Unimin plant, the car was automatically returned to the Unimin plant in that State, except in the case of a very rare glitch. No such glitch brought any of those 237 freight cars into Virginia.

At each of the Unimin plants, Unimin sand was shipped using available empty freight cars, some of which were Petitioner's freight cars in regular service to that plant, and some of which were freight cars provided by the common rail carrier providing transportation to that plant. Therefore, in the instance of any one shipment of sand to a particular customer on a particular day, there was no regular designation of a particular

freight car, either Petitioner's freight car or a car of another carrier, to haul that shipment.

Over the course of the two years in issue, sand shipped from Unimin's New Jersey plants was transported to four other States; sand shipped from Unimin's Illinois plant was transported to 12 other States; and sand shipped from Unimin's Minnesota plants was transported to 16 other States and two Canadian Provinces (8 of the 71 identified customers of the Minnesota plants were located in Canada).

The foregoing facts were not challenged by the Commission.

In addition to the more than 237 of Petitioner's freight cars based at Unimin plants in Illinois, Minnesota and New Jersey which never entered Virginia, some portion of Petitioner's

remaining 86 freight cars were based in Virginia, serving the Unimin sand plant in Virginia and operating over Petitioner's 18 miles of track. Petitioner also operated over that track using freight cars of other railroads.

The Commission raised no question concerning the accuracy of the facts relating to freight cars based in Illinois and Minnesota. The Commission raised one factual issue concerning Petitioner's freight cars based in New Jersey.

The common rail carrier serving Unimin's New Jersey plant, Conrail, placed Petitioner's cars in a "pool" to serve southern New Jersey sand plants, not solely the Unimin sand plant. However, a conclusion that Petitioner's New Jersey based cars served any sand

shipper other than Unimin, except in the case of a very rare glitch, is completely contrary to the evidence, based on both specific testimony and the detailed shipment-by-shipment record for each of Petitioner's New Jersey based freight cars which is contained in the record unchallenged.

A concise statement of the facts in this case included in the record is contained in the Amended Prepared Testimony of David L. Williams in Narrative Form introduced as Applicant's [Petitioner's] Exhibit No. 45, reprinted in the Appendix at p. 165a, infra.

This case took the following procedural course. Petitioner's challenges to 1982 and 1983 ad valorem taxes remained pending without a hearing while Petitioner's prior

challenge to 1981 ad valorem taxes on its freight cars was pending. (Petitioner's challenge to 1981 ad valorem taxes was the subject of a 1983 decision by the Supreme Court of Virginia reversing imposition of tax by the Commission based upon statutory interpretation grounds, and remanding the case to the Commission for further proceedings, Winchester & Western Railroad Co. v. Virginia, 226 Va. 352, 309 S.E.2d 590 (1983). On remand, the Commission upheld taxation of all 323 freight cars, and that decision was sustained in a per curiam decision of the Supreme Court of Virginia, Winchester and Western Railroad Co. v. Virginia, No. 860055 (Va. Sup. Ct. Sept. 5, 1986). Since the 1983 decision had not been appealed to this Court, an attempt to appeal the 1986

decision to this Court was dismissed for want of jurisdiction, 107 S. Ct. 943 (1987).)

By Order of the Commission dated March 2, 1987 (p. 135a, infra), Petitioner was directed to file an Amended Application for Review and Correction of Taxes consolidating its objections to 1982 and 1983 ad valorem taxes. Petitioner's Amended Application for Review and Correction of Taxes, filed on March 26, 1987 (p. 147a, infra), raised the constitutional question as follows (pp. 154a-155a, infra):

> 12. Such tax is unconstitutional for repugnancy to the Due Process Clause of the Fourteenth Amendment of the United States Constitution, and repugnancy to the Commerce Clause of the United States Constitution. Virginia is without constitutional power to impose the entire contested portion of the rolling stock tax for

> the years 1982 and 1983 because each of the railcars as to which that contested portion of the tax has been imposed could have been taxed, consistent with the requirements of the United States Constitution, in one of the states of Illinois, Minnesota and New Jersey in the year in question, had such states enacted tax statutes calling for the taxation of said railcars.

The Amended Application for Review and Correction of Taxes also raised the freight car valuation issue.

On July 1, 1987, a hearing in this matter was held before a Commission Hearing Examiner. Petitioner focussed principally on the Commerce Clause and Fourteenth Amendment issues in its Post-Hearing Brief. The October 2, 1987 Report of Hearing Examiner (p. 53a, infra) found that during each of 1981 and 1982, 237 of Petitioner's freight cars had acquired tax situs

outside of Virginia, and Virginia could therefore constitutionally tax only the remaining 86 freight cars (p. 95a, infra). The Report of Hearing Examiner upheld the challenged valuation of the freight cars under State law.

On January 5, 1988, the Commission issued an Opinion and Order (p. 23a, infra) declining to adopt the Report of Hearing Examiner. The Commission fully upheld the ad valorem tax for both years with respect to all 323 freight cars (pp. 41a-51a, infra) and rejected Petitioner's freight car valuation challenge.

The Commission recognized that under Central Railroad Co. v. Pennsylvania, 370 U.S. 607 (1962), Virginia was not empowered to impose ad valorem tax on rail cars which could have been taxed constitutionally by

another jurisdiction. After examining evidence concerning tax situs in States other than Virginia on the basis of regular routes, the Commission concluded as follows (p. 46a, infra):

> The record shows that, once assigned to the Minnesota, Illinois, or New Jersey pools, [Petitioner] cars were used at random as the volume of shipments required. The record leads us to conclude that [Petitioner] cars were not assigned to transport sand to any particular shipper or to any particular group of shippers. While chance no doubt resulted in repeat movements by [Petitioner] cars - perhaps, frequently - the evidence does not convince us that identified [Petitioner] cars operated over regular routes in states other than Virginia so as to establish a tax situs elsewhere.

The Commission next concluded that the nature of the usage of the freight cars was not sufficient to constitute habitual employment of the freight cars, even on irregular routes, within

Illinois, Minnesota or New Jersey, or within any other jurisdiction. With respect to freight cars based at the Unimin plants in Illinois and Minnesota, which shipped sand predominately to customers located out of State, the Commission concluded (p. 48a, infra):

> [I]t appears that the Illinois and Minnesota pools provided a supply of empty cars for use in overwhelmingly interstate and foreign shipments of sand. Given the nature of these operations, as well as the random loading and dispatching of cars, we cannot conclude that any cars were habitually in Minnesota or Illinois. Likewise, we have no basis to conclude that any of these cars were habitually present in any other jurisdiction so as to permit the latter to impose a property tax on such cars.

With respect to New Jersey based cars, the Commission recognized that there were much more substantial

intrastate shipments than with Illinois or Minnesota based cars. However, the Commission decided (p. 49a, infra):

> We cannot conclude how the [Petitioner] cars were used. Because the record is incomplete, [Petitioner] has not met its burden of showing that cars assigned to the New Jersey pool were habitually present in that state so as to establish tax situs.

Petitioner exercised its right of direct appeal to the Supreme Court of Virginia, challenging the Commission's opinion and order imposing tax on all 323 freight cars, but not appealing the adverse ruling concerning freight car valuation. Petitioner's Assignments of Error (p. 159a, infra) raised the Commerce Clause and Fourteenth Amendment issues (pp. 159a-162a, infra). On November 18, 1988, the Supreme Court of Virginia upheld the decision of the Commission, Winchester

& Western Railroad Co. v. State Corporation Commission, 374 S.E.2d 66 (Va. 1988), pp. 1a and 109a, infra, rehearing denied Jan. 13, 1989, p. 111a, infra.

The Supreme Court of Virginia specifically adopted the reasoning of the Commission in rejecting a conclusion that Petitioner's freight cars could have been constitutionally subject to ad valorem taxation in other States based upon fixed and regular routes.

The Supreme Court of Virginia also recognized that Petitioner would be entitled to prevail if tax situs in other States had been obtained because freight cars were "habitually employed in the other states in substantial numbers over irregular routes." 374 S.E.2d at 70, p. 17a, infra. In

analyzing the situs by habitual employment issue, the Supreme Court of Virginia concluded as follows (374 S.E.2d 70-71, pp. 20a-21a, infra):

> The only proof of habitual presence in Illinois, Minnesota, and New Jersey was the number of times the railcars in question were loaded in those states in 1981 and in 1982. This proof is plainly insufficient under the Central R. Co. analysis of habitual presence based on irregular routes. . . . Proof of the average number of cars irregularly used in a nondomiciliary state is an essential element of proving the existence of another tax situs based on the irregular route approach to habitual presence. Such proof is completely lacking in this case.

The Supreme Court of Virginia expressed no reliance on the Commission's conclusion that the multi-shipper "pool" in which Petitioner's New Jersey based freight cars were placed meant that

Petitioner's New Jersey based freight cars did not regularly return to the Unimin plant, or that the record with respect to New Jersey based cars was incomplete.

Petitioner again raised the Commerce Clause and Fourteenth Amendment issues in its Petition for Rehearing by the Supreme Court of Virginia.

Petitioner's Amended Application for Review and Correction of Taxes had raised the constitutional issue in the context of the right of the States of Illinois, Minnesota and New Jersey to impose ad valorem tax on the freight cars (pp. 154a-155a, infra). However, both before the Commission and before the Supreme Court of Virginia, Petitioner analyzed the constitutional issues by addressing the rights of

Illinois, Minnesota and New Jersey, and the possible rights of the other States through which the freight cars based in Illinois, Minnesota and New Jersey traveled, to impose ad valorem tax. Counsel to Respondents raised no objection to Petitioner's right to so analyze the constitutional issue, and this line of argument was specifically addressed in the decisions of both the Commission and the Supreme Court of Virginia.

REASONS FOR GRANTING THE WRIT

I.

The Supreme Court of Virginia's Holding that a State May Only Constitutionally Impose Ad Valorem Taxation on Rail Cars if There is "Proof of the Average Number of Cars Irregularly Used" in that State Conflicts with Decisions of this Court.

The parties acknowledge that this case is to be determined in accordance with the holding of Central Railroad Co. v. Pennsylvania, 370 U.S. 607 (1962). There, this Court held that "the nondomiciliary State is precluded from imposing ad valorem tax on any property to the extent that it could be taxed by another State, not merely on

such property as is subject to tax elsewhere . . .." Id. at 614 (emphasis original).

The Supreme Court of Virginia concluded in this case that "proof of the average number of cars irregularly used in a nondomiciliary state is an essential element of proving the existence of another tax situs . . .." 374 S.E.2d 71, p. 21a, infra.

This Court's initial analysis explaining the circumstances under which a State may tax the transitory rail cars of a nondomiciliary corporation was Marye v. Baltimore & Ohio Railroad Co., 127 U.S. 117 (1888). There, this Court found Virginia's ad valorem taxation as applied to a Maryland railroad corporation unconstitutional, but noted that "[i]n such cases the tax might be

fixed by an appraisement and valuation of the average amount of the property thus habitually used . . .." Id. at 123-24. Following that suggestion made by this Court, many States enacted tax statutes specifically basing ad valorem taxation of rail cars of nondomiciliary corporations on the average amount of the rolling stock habitually used in the State.

In the instant case, Virginia interprets the constitution to limit a nondomiciliary State's taxation power to those situations which specifically use the Marye formula. However, the average number of cars used in a nondomiciliary State is certainly not a constitutionally mandated test. This Court specifically affirmed a State's taxation of a company's rail cars based upon the ratio of "the number of miles

over which it ran rail cars within the State . . . to the whole number of miles, in that and other States, over which it cars were run." Pullman's Palace Car Co. v. Pennsylvania, 141 U.S. 18, 26 (1891). In a subsequent case, where the number of miles over which a company's rail cars traveled within a State bore little relationship to the average number of cars used in that State, this Court commented:

> How to appraise [movables] fairly when the tangibles constitute part of a going concern operated in many States often presents grave difficulties; and absolute accuracy is generally impossible. We have accordingly sustained methods of appraisement producing results approximately correct . . .. Union Tank Line Co. v. Wright, 249 U.S. 275, 282 (1919).

The suggestion that the average number of cars is simply one possible

method is also in accord with Johnson Oil Refining Co. v. Oklahoma, 290 U.S. 158 (1933). There, when Oklahoma sought to tax all freight cars of a nondomiciliary corporation which were based in that State in very much the same fashion in which the cars in the instant case were based in Illinois, Minnesota and New Jersey, this Court held that "Oklahoma was entitled to tax its proper share of the property employed in the course of business which these records disclose, and this amount could be determined by taking the number of cars which on average were found to be physically present within the State." Id. at 163 (emphasis added).

As noted above, this Court has acknowledged grave difficulties in properly apportioning ad valorem

taxation to various States for movable personal property. If a taxpayer seeking to show that property absent from its domiciliary State during the entire year could constitutionally have been taxed elsewhere must also establish the facts concerning the one method of apportionment among the nondomiciliary States deemed proper by the Supreme Court of Virginia, the Central Railroad decision will be essentially negated.

Here Petitioner has shown that all disputed freight cars were based at particular sites in Illinois, Minnesota and New Jersey, and regularly and continuously traveled to and from those sites. Whether those three States would have the power to impose 100% ad valorem taxation on those freight cars, or whether the other States into which

those cars traveled before returning to Illinois, Minnesota and New Jersey could have apportioned some percentage of ad valorem tax constitutionally, must be held irrelevant to the question of Virginia's right to tax those cars.

Virginia's reliance on exclusive use of the Marye formula is particularly misplaced in the light of the more recent analytical focus this Court has given to Commerce Clause issues in Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977), and following cases. Complete Auto adopted a four-part test for Commerce Clause analysis. As this Court has recently noted, "[t]his four-part formulation has since been used to evaluate the validity of state taxes vis-à-vis the Commerce Clause in a number of contexts." D. H. Holmes Co. v.

McNamara, 108 S. Ct. 1619, 1623 (1988). Complete Auto held that a tax challenged under the Commerce Clause may be sustained:

> when the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State. 430 U.S. at 279.

This Court has specifically endorsed the application of Complete Auto to Commerce Clause analysis in the context of State ad valorem taxation of movable personal property. In a case dealing with cargo containers, this Court observed:

> We may assume that, if the containers at issue here were instrumentalities of purely interstate commerce, Complete Auto would apply and be satisfied, and our Commerce Clause inquiry would be at an end. Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 445 (1979).

However, since this Court in Japan Line concluded that the cargo containers were instrumentalities of foreign commerce rather than instrumentalities of interstate commerce, this Court has not yet taken the opportunity to subject State ad valorem taxation to the Complete Auto test in an intrastate context.

Analyzing this case in the context of the Complete Auto four-part test, it is clear that the holding of the Supreme Court of Virginia is in direct conflict with the pronouncements of this Court.

First, focussing the right of States other than Virginia to tax the disputed 237 freight cars, it is obvious that the constant travel to and from base locations in Illinois, Minnesota and New Jersey constituted a

substantial nexus with those States. Whether the nexus with the other States through which those freight cars traveled was sufficient to establish tax situs consistent with the Commerce Clause is irrelevant in the instant case, since if the nexus were insufficient the States of Illinois, Minnesota and New Jersey could then tax 100% of the value, still leaving Virginia without the constitutional power to impose the tax.

Second, the rigid rule imposed by the Supreme Court of Virginia for apportionment of the tax has been discussed at pp. 32 to 38, supra, but it is clear that none of the various permissible apportionment formulas would allow Virginia to impose any ad valorem taxation on the freight cars.

Third, the States of Illinois,

Minnesota and New Jersey, and perhaps other States through which the freight cars traveled, could have enacted a variety of ad valorem taxing schemes which would not have discriminated against interstate commerce. Again, the Supreme Court of Virginia's requirement that Petitioner make its proof in terms of one particular theoretical taxing scheme is misplaced.

Fourth, whether Illinois, Minnesota and New Jersey could impose 100% ad valorem tax as the base locations of the freight cars to which the States disproportionately provided services, or whether other States through which the freight cars traveled would have a fair claim for apportioned services, should not have to be established by Petitioner in order to demonstrate that Virginia's taxation is unconstitutional.

II.

The Decision of the Supreme Court of Virginia Raises an Important and Unresolved Problem.

Complete Auto, supra, specifically dealt with a sales or revenue tax. Complete Auto has also been applied to business and occupation taxes, Department of Revenue of Washington v. Association of Washington Stevedoring Cos., 435 U.S. 734 (1978); income taxation of a nondomiciliary corporation derived from a domestic subsidiary, Mobil Oil Corp. v. Commissioner of Taxes of Vermont, 455 U.S. 425 (1980); mineral severance taxes, Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981); and use taxes, D. H. Holmes, supra. Its use

has been specifically endorsed by this Court to analyze ad valorem taxation of movable personal property in intrastate commerce, but not used, in Japan Line, supra.

As recognized by this Court since the nineteenth century, movable personal property, first by rail and ship, and now by truck and air carrier, is an inherent feature of interstate commerce. States and localities continue to rely on ad valorem taxation for a significant share of tax revenues. Resolution of uncertainties as to whether a rigid test relying simply on a suggestion by this Court in Marye will be important to States and to the transportation industry, especially in light of the Commerce Clause analysis used by this Court in Complete Auto.

CONCLUSION

For these reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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April 24, 1989

SUPREME COURT OF VIRGINIA

PRESENT: Carrico, C.J., Poff, Compton, Stephenson, Russell, and Thomas, JJ., and Gordon, Retired Justice

WINCHESTER AND WESTERN RAILROAD COMPANY

v. Record No. 880537

STATE CORPORATION COMMISSION

OPINION BY JUSTICE JOHN CHARLES THOMAS
Nov. 18, 1988

FROM THE STATE CORPORATION COMMISSION

In this appeal of right from the State Corporation Commission (the Commission), Winchester and Western Railroad Company (Winchester) contends that the Commission erred in assessing, against all 323 of its railcars, the rolling stock tax provided for in Code §§ 58-515 and 58-524(5). This appeal concerns the taxes imposed on

Winchester's railcars in 1982 and 1983.* The 1982 taxes were based on data from calendar-year 1981; the 1983 taxes were based on data from calendar-year 1982. According to Winchester, in both 1981 and 1982, only 86 of its railcars were used in Virginia. The remaining 237 railcars were used in other parts of the United States. Winchester submits that the railcars not used in Virginia acquired tax situses in other jurisdictions and thus could not constitutionally be taxed by Virginia.

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*W. & W. Ry, Co. v. Commonwealth, 226 Va. 352, 309 S.E.2d 590 (1983), concerned the 1981 rolling stock tax on Winchester's railcars.

The Commission rules against Winchester on the ground that Winchester had failed to meet its burden of proving that the railcars not used in Virginia had established tax situses in other particular jurisdictions. In our opinion, the Commission correctly decided this matter.

Winchester is a Virginia corporation. It owns eighteen miles of track, all located within the Commonwealth between Gore and Winchester. In the tax years here in question, Winchester had 323 railcars under lease and thus subject to taxation.

Winchester is a wholly owned subsidiary of Unimin Corporation which produces silica sand in Virginia and in various other states, including

Illinois, Minnesota, and New Jersey. Winchester provided railcars to serve Unimin's Virginia plant. The Unimin plant in Illinois was served by a railcar pool provided by the Baltimore and Ohio Railroad. The plants in Minnesota were served by a railcar pool provided by the Chicago and Northwestern Railroad. And, the plants in New Jersey were served by a railcar pool provided by Conrail. In the early 1980's, Unimin concluded that the three railcar pools serving its Illinois, Minnesota, and New Jersey plants did not contain enough of certain types of railcars to meet Unimin's needs.

In 1981 and 1982, Winchester railcars, all bearing Winchester markings, were dispatched from Virginia to become part of the three previously described railcar pools. In 1981, 122

Winchester railcars were sent to the Illinois pool; 68 to the Minnesota pool; and 48 to the New Jersey pool. In 1982, 123 Winchester railcars were sent to the Illinois pool; 69 to the Minnesota pool; and 45 to the New Jersey pool. The Winchester cars sent to the three railcar pools were marked to be returned to these pools when empty.

The evidence adduced by Winchester reveals that the nature of these railcar pools was such that Winchester's railcars were simply mixed in at random with all the other railcars in the various railcar pools. Railcars from the three pools were loaded and sent to customers in a random manner. That is to day, no particular railcar, Winchester or otherwise, was loaded and sent to a

particular customer in a particular state. Consequently, on any given day, for example, a Winchester railcar, because it happened to be part of the pool serving the Minnesota plants, might be loaded in Minnesota and sent to a customer in Texas; the next day a railcar from the same Minnesota pool, but owned by another carrier, might be loaded in Minnesota and sent to the same customer in Texas over the same route. But a Winchester railcar from the Minnesota pool might be used to serve that Texas customer the next day, the next month, or never again. It was all completely up to chance.

As suggested by the foregoing example, the railcars sent to the three railcar pools were not used exclusively in Illinois, Minnesota, or New Jersey. The Illinois plant sent shipments to 48

customers in 13 states and 1 Canadian province. One New Jersey plant sent shipments to 9 customers in 5 states; the other New Jersey plant sent shipments to 3 customers in 3 states. One Minnesota plant sent shipments to 71 customers in 17 states and 2 Canadian provinces; the other Minnesota plant sent shipments to 15 customers in 4 states and 1 Canadian province. The five plants which used railcar pools that included Winchester railcars shipped to a combined total of 146 customers in 23 different states and 2 different Canadian provinces. Because of the way the pools were operated, Winchester railcars could have been shipped to any of these customers in any of those states and Canada at any time or at no time.

In its effort to prove that only

the 86 railcars used in Virginia in 1981 and 1982 could be taxed by Virginia, Winchester proved the number of times its railcars were located at the Unimin plants in Illinois, Minnesota, and New Jersey. It also proved the states through which a railcar would have to travel to get from a particular plant to a particular customer.

On appeal of a tax assessment by the Commission, the burden is on the taxpayer to prove that the assessment is erroneous. N. & W. Ry. Co. v. Commonwealth, 211 Va. 692, 694, 179 S.E. 2d 623, 626 (1971). Further, the findings of the Commission will be given great weight on appeal and will not be disturbed unless based on inherently incredible evidence or unless unsupported by evidence. Id. at

700, 179 S.E.2d at 629; accord Farmers and Merchants v. Commonwealth, 213 Va. 401, 192 S.E.2d 744 (1972). In our opinion, Winchester has not met this burden. This is so principally because Winchester did not meet the burdens imposed upon it in the original proceeding before the Commission.

As pointed out earlier, Winchester is a Virginia corporation with all of its track located within the Commonwealth. When Winchester was before this Court challenging its 1981 rolling stock tax, we approved the "basic presumption . . . that an intrastate railroad has only enough cars to enter its public service in Virginia and that it is habitually using all its own cars for that purpose." W. & W. Ry. Co. v. Commonwealth, 226 Va. 352, 359, 309

S.E.2d 590, 595 (1983). We went on to day that one way in which Winchester could rebut that presumption was by showing that some of its railcars had established a tax base elsewhere.

The question whether a railroad has established a tax base outside its domiciliary state for certain of its property has long been the subject of federal constitutional law. See. e.g., Pullman's Car Co. v. Pennsylvania, 141 U.S. 18 (1891). This is so because the taxation of property used in interstate commerce raises questions under both the Commerce Clause and the Due Process Clause of the Fourteenth Amendment. Braniff Airways v. Nebraska Board, 347 U.S. 509, 598-99 (1954).

The Supreme Court has attempted to strike a balance between the power of a domiciliary state to tax property of

one of its domestic corporations wherever that property might be and the power of a nondomiciliary state to tax property found within its borders. The Supreme Court has expressed two key concerns: (1) that property used in interstate commerce should not be subject to multiple taxation, Central R. Co. v. Pennsylvania, 370 U.S. 607, 612 (1962); Standard Sand Co. v. Peck, 342 U.S. 382, 384 (1952), and (2) that property used in interstate commerce should not escape all taxation, Central R. Co., 370 U.S. at 616-17; Northwest Airlines v. Minnesota, 322 U.S. 292, 300 (1944); Pullman's Car Co., 141 U.S. at 29. Thus, the Supreme Court is concerned both with over-taxation and under-taxation. The aim is correct taxation, such that property used in interstate commerce is taxed 100

percent -- and no more -- of its value by all the taxing jurisdictions which can legitimately assert a right to tax. Because the taxpayer who owns or controls movable property should know where the property is and how it is being utilized, the burden is on the taxpayer to prove the appropriate nondomiciliary tax situs. If the taxpayer fails in this proof, then the domiciliary state can tax the property to 100 percent of its value.

The most pertinent case in the area of a domiciliary state's power to tax movable property used outside the state is Central R. Co. v. Pennsylvania, 370 U.S. 607 (1962). There, Pennsylvania sough to impose a property tax upon all of the rolling stock of a Pennsylvania railroad even though a considerable number of the railcars in question

spent a substantial portion of the tax year on the lines of other railroads located outside Pennsylvania. Some of the cars were used by Central on its own tracks in Pennsylvania; others were used by Central's parent company, Central Railroad Company of New Jersey (CNJ), on that company's tracks in New Jersey; and others were used by unaffiliated railroads on their lines in various parts of the country. The dispute focused upon Pennsylvania's power to tax the railcars used in New Jersey and across the country.

The Supreme Court ruled that there were two ways in which Central could show that its railcars had established a tax situs in another state: (1) by proving that the railcars travelled through particular states on fixed and regular routes or (2) by proving that a

substantial number of railcars were used on irregular routes in particular states. Under either approach, Central was required to establish the average number of railcars so used in a particular state. Applying that test to the facts in Central R. Co., the Court concluded that Pennsylvania could not tax the railcars used in New Jersey but could tax the railcars used at random in various other parts of the country.

With regard to the railcars used in New Jersey, the Supreme Court held that Pennsylvania could not tax all of their value because they were used in New Jersey on fixed routes and regular schedules. The Supreme Court concluded that such use amounted to habitual employment of the railcars in New Jersey. The Court wrote as follows: Their habitual employment within the

jurisdiction in this manner would assuredly support New Jersey's imposition of an apportioned ad valorem tax on the value of the appellant's fleet of freight cars." Central R. Co., 370 U.S. at 613, (emphasis in original). The Supreme Court then held that "the daily average of freight cars located on the CNJ lines in the 1951 tax year . . . could not constitutionally be included in the computation of this Pennsylvania tax." Id. at 614 (emphasis added).

With regard to the railcars used in various other parts of the country outside of Pennsylvania, the Court concluded that the taxpayer had simply failed to meet its burden of proving the existence of another tax situs. The Court wrote as follows:

> [T]his record shows only that a determinable number of appellant's cars were employed

> outside the Commonwealth of Pennsylvania during the relevant tax year. But as this leaves at large the possibility of their having a nondomiciliary tax situs elsewhere, that showing does not suffice under our cases to exclude Pennsylvania from taxing such cars to their full value.

Id. at 616 (emphasis added).

Central R. Co., along with other cases referred to above in this opinion, guide the proper disposition of the present appeal by supplying us with the following legal principles: The domiciliary state has the power to tax all of the property of a domiciliary corporation unless the taxpayer proves that some or all of that property has established a tax situs elsewhere. To establish a tax situs in nondomiciliary states, the taxpayer must prove either that certain of its property moved through those

states on fixed and regular routes or must prove that certain of its property was habitually employed in the other states in substantial numbers over irregular routes. No matter which approach is taken to establish another tax situs, the taxpayer must show the average number of railcars used in the other states. A taxpayer cannot meet its burden of proof of another tax situs simply by proving that the property in question was outside of the domiciliary state during the pertinent tax year.

With the foregoing principles in mind, we think it plain that Winchester cannot prevail in its appeal. This is so because Winchester failed by either approach set forth in Central R. Co. to prove the existence of any other tax situs for the property. Of course,

this proof had to be made by Winchester in order to rebut the presumption that because Winchester is a Virginia intrastate railroad, all its railcars are habitually used in Virginia.

Winchester failed to prove that its railcars travelled fixed and regular routes in other states. What Winchester proved is that its parent company, Unimin, had fixed routes for making deliveries to its various customers. Even if we assume that Winchester also proved that Unimin had a regular schedule of deliveries to its various customers, the fact remains that Unimin's routes and schedules do not establish that Winchester's railcars travelled fixed and regular routes. The Commission wrote as follows in rejecting Winchester's claim that it had proved some of its railcars

travelled fixed and regular routes in other states:

> W & W's evidence does not support a finding of tax situs on the basis of regular routes, interstate of intrastate, in any foreign jurisdiction. The record shows that, once assigned to the Minnesota, Illinois, or New Jersey pools, W & W cars were used at random as the volume of shipments required. The record leads us to conclude that W & W cars were not assigned to transport sand to any particular shipper or to any particular group of shippers. While chance no doubt resulted in repeat movements by W & W cars -- perhaps, frequently -- the evidence does not convince us that identified W & W cars operated over regular routes in states other than Virginia so as to establish a tax situs elsewhere.

We agree with the Commission's conclusion in this regard.

Winchester argues that even if its evidence was insufficient to prove the existence of another tax situs based on

fixed and regular routes, it is certainly sufficient to prove habitual presence in Illinois, Minnesota, and New Jersey. We disagree. The only proof of habitual presence in Illinois, Minnesota, and New Jersey was the number of times the railcars in question were loaded in those states in 1981 and 1982. This proof is plainly insufficient under the Central R. Co. analysis of habitual presence based on irregular routes. The precise language from Central R. Co. on this issue is as follows:

> [A] nondomiciliary tax situs may be acquired even if the rolling stock does not follow prescribed routes and schedules in its course through the nondomiciliary State. In American Refrigerator Transit Co. v. Hall, 174 U.S. 70, this Court sustained the constitutionality of a Colorado property tax on a stipulated average number of railroad cars that had been located within the territorial limits of Colorado during the tax

> year, although it was agreed by the parties that the cars "never were run in said State in fixed numbers nor at regular times, nor as a regular part of particular trains." Id., at 72. Habitual employment within the State of a substantial number of cars, albeit on irregular routes, may constitute sufficient contact to establish a tax situs permitting taxation of the average number of cars so engaged.

370 U.S. at 615 (emphasis added). Proof of the average number of cars irregularly used in a nondomiciliary state is an essential element of proving the existence of another tax situs based on the irregular route approach to habitual presence. Such proof is completely lacking in this case.

In short, all Winchester really proved was that in 1981 and 1982, 237 railcars were located outside of Virginia in several other states during

the tax years. This proof falls far short of what is required to defeat a domiciliary state's power to tax the property of one of its corporations.

For all the foregoing reasons, the Order of the Commission herein appealed with be

Affirmed.

COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION

AT RICHMOND, JANUARY 5, 1988

APPLICATION OF

WINCHESTER AND WESTERN RAILROAD COMPANY

CASE NO. PST820003

For review and correction of rolling stock tax assessment - tax year 1982

APPLICATION OF

WINCHESTER AND WESTERN RAILROAD COMPANY

For review and correction of rolling stock tax assessment - tax year 1983

OPINION AND ORDER

Shannon, Commissioner,

Before the Commission are the record and the hearing examiner's report on the Winchester and Western Railroad Company's (W&W or the

Railroad) application for review and correction of its 1982 and 1983 rolling stock tax assessments. For reasons set out in this opinion, the Commission declines to adopt the hearing examiner's report. Rather, we find that W&W is liable for the full amount of the 1982 and 1983 rolling stock taxes assessed, plus penalties and interest.

On August 11, 1982, W&W filed an application seeking review and correction of its 1982 rolling stock tax assessment. W&W argued that the Commission had valued freight cars and other equipment in excess of fair market value and that we had assessed freight cars not habitually used in Virginia. W&W filed another application on July 11, 1983, seeking review and correction of its 1983

rolling stock tax assessment for the same reasons claimed in the 1982 application. Action on the applications were deferred pending the outcome in the appeal of an earlier Commission decision denying W&W's application for a correction of its 1981 rolling stock tax assessments. Our 1981 tax assessments were eventually affirmed after two appears to the Virginia Supreme Court. Winchester & Western Railroad v. Commonwealth, 226 Va. 352 (1983); Winchester & Western Railroad v. Commonwealth, No. 860055 (Va. Sup. Ct. Sept. 5, 1986.) (mem.) On January 27, 1987, the United States Supreme Court dismissed an appeal for lack of jurisdiction. ____ U. S. ____, 107 S. Ct. 943 (1987).

On March 2, 1987, the Commission entered an order consolidating the W&W

1982 and 1983 applications and directing the company to amend to reflect the disposition of the 1981 application. An amended consolidated application was filed on March 26, 1987, and a hearing before Glenn P. Richardson, Hearing Examiner, was conducted on July 1, 1987. Counsel appearing were Flournoy L. Largent, Jr., Esquire, and Joseph C. Shapiro, Esquire, for W&W; and Wayne N. Smith, Esquire, for the staff.

BACKGROUND

W&W, a Virginia corporation, is a wholly-owned subsidiary of Unimin Corporation (Unimin), a Delaware corporation whose principal place of business is in Connecticut. Unimin's business in 1981 and 1982 consisted mainly of mining, processing, and selling silica sand. It owned a number

of sand plants including one in Gore, Virginia, two in New Jersey, two in Minnesota, and one in Illinois.

In 1981 and 1982, W&W owned eighteen miles of track located entirely within Virginia. The line extended from Gore to Winchester where it interconnected with the Baltimore and Ohio Railroad and Conrail. W&W operated 323 freight cars under long-term lease, including 299 covered hopper cars and 24 box cars.

The majority of W&W's freight cars were assigned to car pools in Illinois, Minnesota, and New Jersey. W&W participated in car service and car interchange arrangements sponsored by the American Association of Railroads and filed with the Interstate Commerce Commission and State regulatory bodies, including this Commission, Subject to

certain limitations dictated by the pooling arrangements, all U. S. freight hauling railroads could interchange the W&W cars and use these cars on their lines.

During the period in question, 1981-82, there was substantial demand for cars, and Unimin experienced chronic shortages of equipment at its plants. W&W assigned cars to the pools which served Unimin plants, which plants became the origin point for loaded cars and the destination point for emptied cars. These originating cars were not assigned to fixed routes or fixed receivers. The W&W cars, as well as other railroads' cars, were randomly loaded and dispatched as needed to serve sand plant customers. In other words, the W&W cars moved randomly to assorted consignees.

The record does not identify particular W&W cars from the Illinois or Minnesota pools that were used in intrastate service within those states. According to W&W, most of the sand shipments originated by Unimin in Minnesota and Illinois are shipped to consignees outside those two states.

Unlike the Illinois and Minnesota pools, the New Jersey pool served sand producing plants owned by Unimin and by other producers. Most of the Unimin shipments originated in new Jersey went to New Jersey customers, but there is no information on the destination of shipments originated by the other New Jersey producers drawing cars from the pool. Likewise, the record contains no identification of those cars used only within New Jersey.

W&W'S POSITION

W&W challenges the Commission's assessments on two grounds. First, the company contended that our assessments reflected a valuation for covered hopper and box cars in excess of fair market value. In support of this position, the Railroad offered its expert appraisal witness, Calvin H. Nelson. According to Mr. Nelson, the fair market value of all freight cars was $5,633,000 as of December 31, 1981, and $4,145,000 as of December 31, 1982. By contrast, we valued the same cars at $10,371,700 as of January 1, 1982, and $9,761,600 as of January 1, 1983.

W&W's second contention was that the Commission improperly allocated the cars 100% to Virginia and assessed the rolling stock tax on the total fair market value rather than a proportion.

According to W&W, the pooling arrangement described above established a tax situs outside Virginia for 238 of the cars in 1981 and 237 of the cars in 1982. Alternatively, W&W maintained that these same cars were not habitually used in Virginia so as to make them subject to the rolling stock tax. Consequently, Virginia could tax only a proportion of the cars' value. The basis for this position was the Railroad's extensive evidence of car loadings at Unimin sand plants in Illinois, Minnesota, and New Jersey as well as at the Gore, Virginia, plant.

W&W presented no evidence on the valuation or assessment of other classes of rolling stock. Accordingly, we shall treat those portions of its application as abandoned and consider only the assessments of freight cars.

STAFF POSITION

The staff maintained that the Commission's assessments reflected the fair market value of the freight cars and the proper allocation to Virginia of 100% of that value. With regard to the valuation of freight cars, our assessments were made using the original-cost-less-depreciation methodology. As explained by staff witness A. L. O'Bryan, a condition or depreciation factor was applied to the original cost of W&W equipment to compute the fair market value for each tax year in question. For tax year 1982, the factor applied to freight car original cost was .85, and the factor for tax year 1983 was .80.

Turning to the allocation of the fair market value to Virginia, Mr. O'Bryan testified that the assessments

were made pursuant to our 1928 Administrative Order governing rail taxation. Consistent with all prior applications of that order, 100% of the value of the cars was assigned to Virginia because, for the tax years in question, W&W had track only in Virginia.

DISCUSSION

Under Virginia law, the Commission's tax assessments are presumed to be correct in both methodology and result. Richmond, Fredericksburg & Potomac Railroad v. State Corporation Commission 219 Virginia 301, 313 (1978). The taxpayer has the burden of proving the assessments are erroneous. Norfolk & Western Railway v. Commonwealth, 211 Va. 692, 695 (1971). In this case, W&W contends that our assessments of

rolling stock tax for both tax years are improper and excessive on two grounds. We shall consider first the company's arguments and evidence purporting to overcome the presumption that the assessments reflect the fair market value of the cars. We shall then consider the evidence offered to rebut the presumption that the Commission correctly assigned 100% of the freight cars' fair market value to Virginia.

Virginia Constitution, Art. X, §2, mandates the assessment of railroad rolling stock, and all other property, at fair market value. For the years in question, the Commission conformed to its historic practice of establishing the fair market value for rolling stock of all railroads and car companies by adjusting the original cost thereof, as

shown by the taxpayer's records, by a condition factor based primarily on the age of the equipment. This methodology for assessing railroad property has been upheld by the Supreme Court. Norfolk & Western Railway, 211 Va. at 697, 700; Winchester & Western Railroad v. Commonwealth, No. 860055 (Va. Sup. Ct. Sept. 5, 1986) (mem).

There is no dispute over the original cost of the 299 covered hopper cars and the 24 box cars which were being operated by W&W under long-term lease. The staff and company witnesses agreed on the age of the cars, and they further assumed that all cars reflected the same level of wear and maintenance. The Railroad offered no evidenced no evidence disputing the staff's computation of the condition factors applied to the original cost of

the cars. Rather, W&W offered the evidence of Calvin H. Nelson to establish the market value of the covered hopper and box cars, independent of their original cost.

While upholding the Commission's use of original cost less depreciation in determining fair market value, the Supreme Court has also held that evidence of actual sales of public service corporation property, if available, would be a better means of establishing fair market value. Lake Monticello Service Co. v. Board of Supervisors of Fluvanna County, 233 Va. 111, 115-16 (1987). In a frequently cited opinion reviewing the assessments of real estate, the Court found that a relevant market included both those willing to sell, but not obligated to do so, and those willing to purchase,

but not required to do so. A price acceptable to a buyer and a seller under those circumstances would be evidence of fair market value. Tuckahoe Women's Club v. City of Richmond, 199 Va. 734, 737 (1958).

The Commission is not persuaded that Mr. Nelson's estimates of market value equal prices upon which buyers and sellers would agree. The witness based his appraisal on the declining number of box cars and covered hopper cars and the declining volume of rail traffic using these cars during the period 1978 to 1985. The record is unclear on how this trend was applied to valuation, but Mr. Nelson did reach a conclusion on the precise dollar value of both types of cars as of December 31, 1981, and December 31, 1982. Our problem with these estimates

is that, following the Court's analysis in Tuckahoe Woman's Club, we cannot say whether any seller of cars would have accepted prices equal to Mr. Nelson's estimate of fair market value or whether any purchaser could have secured cars at those prices. In short, these estimates constitute no more than speculation on the market value of these cars. On the basis of this record, we are not persuaded that Mr. Nelson's estimated values reliably reflect the market prices of the cars in 1981 and 1982.

Various aspects of Mr. Nelson's evidence further reduces its persuasive powers. The witness used data from years after the period in question to develop his analysis, and it seems inevitable but that hindsight shaped his opinion of market prices in 1981

and 1982. In the present context, we believe that only contemporaneous sales data can properly show market prices. Mr. Nelson's exhibits also ignored the fact that W&W had both equipped and plain box cars, as well as two sizes of covered hopper cars. In his analysis, the cars are grouped only by broad type, box cars and hopper cars, and conclusions apparently are drawn on that basis. The trend analysis offered by Mr. Nelson also concentrated on the decline of the entire U. S. rail fleet and the decline in car ownership figures of large railroads. The smaller railroads, the W&W, were actually expanding their car fleets during the period in question while major railroads were reducing their fleets. These divergent trends could have influenced markets for cars, but

Mr. Nelson apparently did not consider this.

The Commission does not find W&W's evidence of car value sufficient to rebut the presumption of correctness and to establish a lower fair market value. We read the opinions of our Supreme Court to require our consideration of relevant market prices in arriving at fair market value when such prices are offered. In this case, W&W presented only an economic trend analysis, which analysis we find to be flawed. Further, we are not persuaded that the values determined by the company witness indicate market prices accepted by buyers and sellers in 1981 and 1982. Accordingly, the presumption of correctness of the valuations equal to the original cost of the cars, less depreciation, stands unrebutted.

We turn now to W&W's second contention, that the Commission improperly included 100% of the railroad's rolling stock in its assessments. Since the 1920's, the Commission has presumed that a Virginia domiciliary railroad with all of its track located within Virginia, such as W&W, owns only so much rolling stock as is necessary for its Virginia operations, and all rolling stock is habitually used in Virginia. Our presumption has been accepted by the Court. Winchester & Western Railroad, 226 Va. at 359.

While recognizing the reasonableness of this presumption, the Court further concluded that it could be rebutted. First, a Virginia railroad operating only in Virginia can rebut the presumption by showing that

the average amount of rolling stock habitually used in Virginia, including cars of other railroads, is less than the total amount of its rolling stock. In the alternative, such a railroad can rebut the presumption that all of its cars were habitually used in Virginia (and subject to rolling stock tax) by showing that some of its cars had established a tax base in another jurisdiction. 226 Va. at 360.

The Railroad made no effort to rebut the presumption that all of its cars were taxable in Virginia by showing that it owned more cars than the aggregate number of W&W and foreign line cars which were habitually used in its Virginia operations. In fact, the president of the Railroad, David L. Williams, testified that, during the years in question, W&W operations at

Gore required a number of cars generally equal to the total number of W&W cars. Significantly, the company's evidence on the Gore operation also showed the use of a substantial number of cats owned by other railroads in lieu of W&W cars, and in addition thereto.

Rather than show that it habitually used in Virginia operations fewer cars than it owned, W&W tried to show that a significant number of its cars had a tax base in other jurisdictions. To establish a tax base outside Virginia so as to bar application of the rolling stock tax, the Commission believes that evidence must show identifiable tax situs for cars in a particular jurisdiction. Merely showing that freight cars were outside Virginia, even for the entire year, does not, of

itself, establish a tax situs in another jurisdiction. Requiring the establishment of a foreign tax situs of specific cars in order to bar their taxation by Virginia is in keeping with federal case law. Central Railroad v. Pennsylvania, 370 US 607 (1962). We believe the Court intended this same requirement in Winchester & Western.

In Central Railroad, the United State Supreme Court reviewed the application of a Pennsylvania tax on rolling stock to a domiciliary railroad with track located only in Pennsylvania. Some of the Pennsylvania railroad's cars were used in Pennsylvania while others were used in other jurisdictions. In determining whether some of the cars had established a tax situs outside of Pennslyvania so as to bar application

of that state's tax, the Supreme Court established a two-part test. If a railroad could show that cars traveled interstate along fixed and regular routes, regardless of the length of time spent in each nondomiciliary state, each state through which the cars passed on a regular basis could constitutionally impost property taxes measured by some apportioning formula. One or more foreign states' right to tax a portion of the car fleet would bar the domiciliary state from taxing the full value of the fleet. Alternatively, tax situs for cars could be acquired in a nondomiciliary state by habitual employment of the cars, even on irregular routes, within that state. 370 US at 614-15. In either case, the existence of the foreign tax situs must be shown by the taxpayer.

W&W's evidence does not support a finding of tax situs on the basis of regular routes, interstate or intrastate, in any foreign jurisdiction. The record shows that, once assigned to the Minnesota, Illinois, or New Jersey pools, W&W cars were used at random as the volume of shipments required. The record leads us to conclude that W&W cars were not assigned to transport sand to any particular shipper or to any particular group of shippers. While chance no doubt resulted in repeat movements by W&W cars - perhaps, frequently - the evidence does not convince us that identified W&W cars operated over regular routes in states other than Virginia so as to establish a tax situs elsewhere.

The Commission is also not

persuaded that assignment to a particular pool established a tax situs in Illinois, Minnesota, New Jersey, or any other jurisdiction on the basis of habitual presence in that jurisdiction. The pools existed to supply empty cars to the Unimin plants. W&W's evidence showed that most of the receivers of sand from Unimin's Minnesota and Illinois plants were outside those two states. Accordingly to the Railroad, the group of customers receiving well over 90 percent of shipments from Unimin's Minnesota sand plants had deliveries at 86 separate locations in 1981 and 1982. Three of the locations were in Minnesota, and the other 83 were in seventeen states and two Canadian provinces. A similar distribution is found in Illinois where the customers

receiving well over 90 percent of the sand for those two years had deliveries at 46 locations. Four delivery points were in Illinois, and the rest were distributed among thirteen states and one Canadian province.

From the foregoing, it appears that the Illinois and Minnesota pools provided a supply of empty cars for use in overwhelming interstate and foreign shipments of sand. Given the nature of these operations, as well as the random loading and dispatching of cars, we cannot conclude that any cars were habitually in Minnesota or Illinois. Likewise, we have no basis to conclude that any of these cars were habitually present in any other jurisdiction so as to permit the latter to impose a property tax on such cars.

As noted above, the New Jersey pool

differed from the Illinois and Minnesota arrangement in two respects. First, according to W&W, Unimin's New Jersey plants, unlike the plants in other states, served a substantial number of New Jersey customers. Further, the New Jersey car pool served plants owned by both Unimin and other shippers. The principal receivers of sand from the Unimin plants are identified, but neither the other shippers drawing cars from the pool nor their customers receiving sand are identified. We cannot conclude how the W&W cars were used. Because the record is incomplete, W&W has not met its burden of showing that cars assigned to the New Jersey pool were habitually present in that state so as to establish tax situs.

While W&W showed that many of its

cars were outside Virginia during the tax years in questions, the Commission finds that the evidence is insufficient to rebut the presumption of taxability. We have considered the Railroad's evidence carefully, and we have assumed that the pooling arrangement operated as intended. In fact, the record shows that cars disappeared from the pools, at times for extended periods, and their use is undocumented. Further, there is reason to question the accuracy of determining assignment of particular cars to a pool on the basis of car loadings. W&W's president conceded that there were errors and inconsistencies in some of the studies used to determine pool assignments. Even after ignoring these problems, we are not persuaded that the extensive interstate and foreign

operations of Unimin establishes tax situs outside Virginia for specific cars owned by a Virginia domiciliary railroad with all of its track in Virginia. Accordingly, the presumption of assignment of 100% of the fleet to Virginia stands unrebutted.

CONCLUSION

The W&W abandoned its challenge to assessments of rolling stock other than freight cars. The only issues upon which evidence was offered, and arguments made, were the valuation of covered hopper and box cars and the assignment of 100% of their value to Virginia for taxation. The Commission finds that the company has not rebutted the presumption of correctness of the assessments. The record does not persuade us that the original cost of the freight cars, adjusted by a

condition factor, resulted in assessments in excess of fair market value. Likewise, we are not convinced by the evidence that any of the W&W freight cars established a tax situs in any other jurisdiction. The applications for both tax year 1982 and tax year 1983 must be denied. The penalties and interest provided by law on any unpaid taxes should be imposed, and necessary collection procedures should be pursued.

IT IS ORDERED that the applications for review and correction be denied.

AN ATTESTED COPY of this Opinion and Order shall be sent to Flournoy L. Largent, Jr., Esquire, P.O. Box 808, Winchester, Virginia 22601.

A True Copy
Teste:

Clerk of the State
Corporation Commission

Lacy, Chairman, dissents.

COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION

APPLICATION OF

WINCHESTER AND WESTERN RAILROAD COMPANY — CASE NO. PST820003

For Review and Correction of Rolling Stock Tax Assessment - Tax Year 1982

APPLICATION OF

WINCHESTER AND WESTERN RAILROAD COMPANY — CASE NO. PST830001

For Review and Correction of Rolling Stock Tax Assessment - Tax Year 1983

REPORT OF GLENN P. RICHARDSON,
HEARING EXAMINER

October 2, 1987

HISTORY OF THE CASE

On August 11, 1982, Winchester and Western Railroad Company ("Winchester") filed an application seeking a review and correction of its 1982 rolling

stock tax assessment imposed by the Commission pursuant to former Virginia Code §58-515.[1] In its application Winchester claimed that the Commission overvalued its rolling stock causing its assessment to be too high. The application requested that Winchester's 1982 assessment be reduced to include only the freight cars habitually used in Virginia and to assess such cars based on their fair market value. The

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[1] Effective July 1, 1984, Code §58-515 was recodified as §58.1-2652. Although the recodification does not affect the present proceeding, the responsibility for administering the railroad rolling stock tax was transferred from the Commission to the Virginia Department of Taxation.

application was assigned Case No. PST820003.

On July 11, 1983, Winchester filed a second application seeking a review and correction of its 1983 rolling stock tax assessment. Winchester once again claimed that its rolling stock was overvalued and requested that its 1983 assessment be reduced. The second application was assigned Case No. PST830001.

Counsel for Winchester and the Commission agreed to defer action on the applications pending appeal of an earlier Commission decision denying Winchester's petition to correct its 1981 rolling stock tax assessment. Petition of Winchester and Western Railroad Company, 1983 SCC Ann. Rpt. 187. After two appeals to the Virginia

Supreme Court, the Commission's 1981 rolling stock tax assessment was eventually affirmed. See Winchester and Western Railroad v. Commonwealth, 226 Va. 352, 309 S.E.2nd 590 (1983) rev'd and remanded; Winchester and Western Railroad v. Commonwealth, Record No. 860055 (Va. Sup. Ct. Sept. 5, 1986).

On December 1, 1986, the Commission entered an order continuing both applications generally pending Winchester's appeal of the Virginia Supreme Court's decision to the United States Supreme Court. On January 27, 1987, the U.S. Supreme Court issued an order dismissing the appeal for want of jurisdiction.

On February 17, 1987, Winchester submitted a letter requesting that its

1982 and 1983 applications be set for hearing before a hearing examiner and heard on a consolidated basis. The commission entered an order on March 2, 1987, consolidating the applications into Case No. PST820003, directing Winchester to file an amended application to reflect the opinions of the Virginia Supreme Court and the order of the U.S. Supreme Court, and scheduling a hearing before a hearing examiner to commence at 10:00 a.m. on July 1, 1987.

Winchester filed an amended application on March 26, 1987. The application came on for hearing on July 1, 1987. Counsel appearing were Flournoy L. Largent, Jr., Esquire, and Joseph C. Shapiro, Esquire, for Winchester; and Wayne N. Smith,

Esquire, for the Commission's Staff. A transcript of the hearing is filed with this Report. Briefs were filed by Winchester and the Commission's Staff on August 21, 1987.

SUMMARY OF THE RECORD

Winchester and Western Railroad Company is a domestic corporation organized under the laws of Virginia. Winchester is a wholly owned subsidiary of Unimin Corporation ("Unimin"), a Delaware corporation whose principal place of business is located in Connecticut. Unimin acquired all the outstanding stock of Winchester in 1977 in order to improve the level of rail service to Unimin's Gore, Virginia plant.

During 1981 and 1982, Unimin's business consisted of mining,

processing and selling silica sand. Unimin owned directly, or through its subsidiaries, six plants: one in Gore, Virginia; two in New Jersey; two in Minnesota; and one in Illinois.

Winchester, on the other hand, owned and operated 18 miles of track located entirely within Virginia. The track ran from Unimin's Gore, Virginia plant to Winchester, Virginia, where it connected with track owned by Conrail and the Baltimore and Ohio Railroad. Winchester also operated a total of 323 freight cars, consisting of 299 covered hopper cars and 24 box cars.

For tax year 1982, the Commission determined that the total value of Winchester's rolling stock was $10,635,768, including all of Winchester's 323 freight cars valued at

$10,371,700. Since the Virginia Code imposed a rolling stock tax of $1.00 per $100 of assessed value, Winchester was assessed a rolling stock tax of $106,357.68 for 1982. Winchester paid $14,245.50 of the assessment and contested the balance amounting to $92,112.18. In its post-hearing brief, however, the Company amended its position and now contests only $89,466.90 of the assessment.

For tax year 1983, the Commission determined that the total value of Winchester's rolling stock was $10,007,894. Once again the Commission included all of Winchester's 323 freight cars at the assessed value of $9,761.600. Based on the effective tax rate, Winchester was assessed a rolling stock tax of $100,078.94. Winchester

paid $14,599.40 of the 1983 assessment and contested the remaining $85,479.54.

In support of the 1982 and 1983 assessments, the Staff presented the estimony and exhibits of A. L. O'Bryan, the Director of the Commission's Division of Public Service Taxation. Mr. O'Bryan explained the methodology his division used to determine the amount of Winchester rolling stock "habitually used" in Virginia and the valuation method used to determine the fair market value of Winchester's freight cars.

In determining the number of freight cars subject to tax, Mr. O'Bryan testified that he relied on the methodology prescribed by an Administrative Order of the Commission dated May 25, 1928. The order provides

that freight cars should be apportioned based on a ratio developed by dividing Virginia car miles by total car miles. If car mile information is not available, as in Winchester's case, the ratio is developed based on the railroad's Virginia road miles and total road miles.

Using the guidelines established by the Administrative Order, the division concluded that all of Winchester's track was located in Virginia. Accordingly, 100% of its rolling stock, or all of Winchester's 323 freight cars, were subjected to Virginia's rolling stock tax in 1982 and 1983.

Mr. O'Bryan further testified that his division determined fair market value by using the cars' original cost, plus additions, less a depreciation

factor based on the cars' useful life. This resulted in Winchester's 323 freight cars being valued at $10,371,700 as of December 31, 1981 (1982 tax year) and $9,761,600 as of December 31, 1982 (1983 tax year).

Winchester argued the assessments are flawed for two reasons. First, Winchester claimed that over 235 of its freight cars had acquired a tax situs outside Virginia. Any rolling stock tax on these cars is unconstitutional under the commerce and due process clauses of the United States Constitution. Second, Winchester claimed that its freight cars were valued by the Commission in excess of their fair market value in violation of Article X, Section 2 of the Constitution of Virginia.

In support of its petition, Winchester presented the testimony and exhibits of two witnesses: David L. Williams, President of Winchester and Western Railroad and Vice-President/ Distribution and Customer Service of Unimin Corporation; and Calvin H. Nelson, President of Wyer, Dick and Associates, Inc.--a transportation consulting firm headquartered in Houston, Texas.

Mr. Williams testified that after acquiring the freight cars, Winchester made specific car assignments to various Unimin plants throughout the country, including the Gore, Virginia plant. Once assigned to a particular plant, the cars would be used to ship silica sand to the customers of that plant and, after unloading, the cars

would be returned to the same plant for reloading and additional shipments. He further testified that each plant's pool of freight cars rarely changed during 1981 and 1982.

In order to establish specific rail car usage, Mr. Williams sponsored voluminous shipping records for all Unimin plants for 1981 and 1982 (App. Exh. Nos. 1-16). Applicant's Exh. Nos. 1 through 13 document shipments from plants outside Virginia during 1981 and 1982. The exhibits show each shipment of silica sand, the tonnage of sand shipped, the specific Winchester car used for shipment, the customer purchasing the sand, and in most cases the customer's place of business or designation point of the shipment. Applicant's Exh. Nos. 14 through 16 are

demurrage records for the Gore, Virginia plant in 1981 and junctions with Conrail and B&O in 1982.

Using these shipping documents as work papers, Mr. Williams' staff examined the documents on a page-by-page basis and prepared summary exhibits showing car assignments for each Unimin plant (App. Exh. Nos. 17 and 18). Applicant's Amended Exh. No. 19 was then prepared showing the number of rail cars habitually, regularly and continuously used outside Virginia during 1981 and 1982. Applicant's Exh. No. 43 shows Virginia rail car usage for 1981 and 1982.

As a cut-off standard for Applicant's Amended Exh. No. 19, Winchester deemed a freight car assigned or "habitually used" at a Unimin plant

only if it met a frequency of utilization standard consisting of at least nine different moves during eight different calendar months. As a quick example, a freight car would be deemed "habitually used" at Unimin's Illinois plant only if that car was loaded and shipped at least nine times during eight different months in a calendar year. In addition, most of the cars were used far more frequently than nine times a year. This was caused simply because multiple shipments in a calendar month were only counted as one move when using Winchester's frequency of utilization standard.

The exhibits demonstrate that car assignments for each Unimin plant remained fairly constant during 1981 and 1982. In 1981 (1982 tax year), for

example, 68 cars served Unimin's Minnesota plants, 122 cars served the Illinois plant, and 48 cars served the New Jersey plants.[2] None of the 238 freight cars were used to serve Unimin's plant in Gore, Virginia. Winchester claimed this leaves only 85 cars that can be constitutionally taxed

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[2] In its brief, Winchester amended the number of cars reported in Applicant's Amended Exh. No. 19 to correct two clerical errors. In 1981, for example, Car No. WW 3018 was counted twice for Illinois. In addition, Car No. WW3153 was removed from Minnesota in 1981 since the case was listed in Applicant's Exh. No. 43 showing car usage in Virginia. The freight car numbers shown in paragraph 2 above represent corrected figures.

in Virginia. The other 238 cars had acquired a tax situs in other jurisdictions.

In 1982 Winchester's rail car assignments were almost identical. Applicant's Amended Exh. No. 19 shows that 69 cars served Unimin's Minnesota plants; 123 cars served the Illinois plant and 45 cars served the New Jersey plants.[3] Once again, none of the 237 freight cars served Unimin's Gore,

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[3] Reported car usage for Illinois in 1982 was reduced by one to eliminate Car No. WW 3149. This car was removed from Illinois since the car was also reported in Applicant's Exh. No. 43 showing car usage in Virginia. Winchester conceded this car can be tax in Virginia.

Virginia plant. Winchester therefore argued that Virginia can only tax its remaining 86 freight cars in 1983. Taxing all 323 cars would be unconstitutional because 237 cars had acquired a tax situs outside Virginia.

A second theory advanced by Winchester, although not vigorously argued at the hearing or in its post-hearing brief, is that Winchester is not the actual owner of the freight cars but only a long-term lessee. Apparently, Winchester's argument here is that the actual owners of the freight cars are Utah and Delaware corporations and that tax situs should be deemed to be the domicile of the owners. If this argument is accepted it would preclude Virginia from taxing any of Winchester's cars.

Winchester's argument must be

summarily rejected, however. The cars continuously displayed Winchester markings and were reported to regulatory agencies as their own. In addition, long-term leases to acquire freight cars are a common occurrence in the rail industry. Leasing versus owning a car has never, to my knowledge, prevented a state from taxing a railroad for car usage. Finally, both the Commission and the Virginia Supreme Court have previously upheld the application of Virginia's rolling stock tax on leased cars in Winchester's 1981 case. Winchester & Western Railroad v. Commonwealth, 226 Va. 352, 309 S.E.2d 590 (1983); Petition of Winchester and Western Railroad, 1983 SCC Ann. Rpt. 187.

On the subject of car valuation, Winchester presented the testimony and

exhibits of Calvin Nelson. Mr. Nelson testified that when appraising Winchester's cars he defined "fair market value" as the price that a car would bring when it is offered for sale by one who desires, but is not obligated, to sell it, and is brought by one who is under no necessity of having it. He further testified that he assumed the freight cars were in excellent condition.

Based on his appraisal, Mr. Nelson testified that as of December 31, 1981, (1982 tax year) the fair market value of Winchester's 299 covered hopper cars was $17,199 per car and the value of its box cars was $12,958 per car. He further testified that as of December 31, 1982 (1983 tax year), the fair market value of the hopper cars was $13,017 per car and the value of the

box cars was $10,542 per car.

Mr. Nelson arrived at his appraised values by examining national trends in car ownership and supply and demand. The basic thrust of his testimony was that an oversupply of freight cars existed in 1981 and 1982 causing the fair market value of Winchester's cars to decline far below book value. Given this appraisal, Winchester argued that use of the Staff's original cost less depreciation method produces an assessed value greater than each car's fair market value in violation of Article X, Section 2 of the Constitution of Virginia.

Based on its evidence, Winchester claimed that only 85 freight cars were subject to the rolling stock tax in 1982, at a total fair market value of $1,450,000, and 86 cars were subject to

tax in 1983, at a total fair market value of $1,087,000. Adding these amounts to the uncontested items of rolling stock produces a total rolling stock tax of $17,140.68 for 1982 and $13,332.94 for 1983.

Since Winchester had the burden of proof in this case, the Staff offered little evidence to demonstrate that its methods to determine rail car usage and car valuation were superior to Winchester's. Indeed, there was no need for the Staff to offer such evidence because the taxing authority's methods are presumed correct when an assessment is challenged. As a result, the Staff's strategy was designated to demonstrate, through cross-examination, that Winchester did not meet its burden of proof because its testimony and exhibits relating to car usage and

valuation were inaccurate and unreliable.

The Staff argued, for example, that Winchester's exhibits do not show that its freight cars assigned to out-of-state Unimin plants were used exclusively by Unimin. Thus, Staff claimed it is reasonable to infer that Winchester's cars were used for purposes other than Unimin shipments. Car usage history established by the shipping documents, for example, contains large, unaccounted for periods of time for many of Winchester's cars thereby supporting the inference that many of the cars were used by other railroads or shippers. According to the Staff, such random and undocumented car usage is legally insufficient to establish a tax situs in jurisdictions outside Virginia.

The Staff also questioned Mr. Nelson's appraisal of Winchester's cars. Staff claimed the fair market value of the cars developed by his trend analysis is flawed and misleading for a number of reasons. The analysis, for example, was based on nationwide trends rather than supply and demand existing on the east coast during 1981 and 1982. Mr. Nelson's analysis was also criticized because various types of hopper and box cars were lumped in one or two broad categories, depending on car type, when assessing market trends and fair market value. No distinction was made between the various capacities of Winchester's cars or other physical characteristics. Finally, the Staff claimed there was little, if any, evidence offered on comparable sales of rail cars during

1981 and 1982, although this information was readily available. At best, the Staff contends that Mr. Nelson's testimony and exhibits show what one expert would have offered for the cars in December of 1981 and 1982 based on hindsight.

Finally, in its brief the Staff argued that the doctrine of collateral estoppel bars Winchester from again arguing that the due process and commerce clauses of the U. S. Constitution were violated by Virginia's assessment of all 323 Winchester cars. The Staff claimed this issue was previously addressed and rejected in Winchester's 1981 case before the Commission, the Virginia Supreme Court, and the U. S. Supreme Court. Collateral estoppel should bar a relitigation of the very same issue in this case.

DISCUSSION

As the above summary reveals, there are three major issues in this case. First, does the doctrine of collateral estoppel bar Winchester from arguing that the Commission's assessment of its 323 rail cars is unconstitutional? Second, has Winchester met its burden of proof by demonstrating that less than 323 freight cars were habitually used in Virginia for the tax years in question? And finally, was the fair market value of Winchester's freight cars less than the amount determined by the Staff using the original cost less depreciation method?

Collateral Estoppel

Because the present proceeding challenges Winchester's 1982 and 1983 tax assessments, and Winchester's earlier application challenged its 1981

assessment, the doctrine of res judicata does not apply. The doctrine of res judicata only bars relitigation of the same cause of action. Lake Monticello Service Co. v. Board of Supervisors, 233 Va. 111, 353 S.E.2d 767 (1987); Bates v. Devers, 214 Va. 667, 202 S.E.2d 917 (1974).

The Staff, however, claims that the kindred doctrine of collateral estoppel bars Winchester from relitigating whether the Commission violated the U. S. Constitution by assessing all of Winchester's 323 freight cars. I disagree.

In resolving issues relating to collateral estoppel, it is always necessary to distinguish between legal issues founded upon essentially the same evidence presented in a prior case and legal issues founded upon new or

different evidence. To give a quick example, if Winchester had argued that its 1982 and 1983 rolling stock assessments were unconstitutional and presented the very same or evidence similar in nature to that presented in its 1981 case, the doctrine of collateral estoppel would appear to bar a relitigation of the same issue here. The challenge would be barred by collateral estoppel simply because the same issue had been addressed under nearly identical evidence in a prior case.

In the present case, however, Winchester's constitutional argument is based upon new evidence not presented in its previous case. This new evidence, consisting of Unimin shipping documents relating to car usage in Virginia and other states, is far

different than that presented in Winchester's 1981 case. Rather than focusing primarily on car usage in Virginia, as Winchester did in its prior case, the evidence presented in this case is more detailed and documents car usage in other jurisdictions as well as Virginia. This new evidence is designed to establish that the tax situs of over 235 of its freight cars was located outside Virginia in 1981 and 1982. This new evidence is offered in support of Winchester's constitutional argument, and I find that collateral estoppel cannot be used to bar the presentation of this new and relevant evidence. Lake Monticello Service Co. v. Board of Supervisors, 233 Va. 111, 116 (1987).

Second, if the Staff's argument is accepted, it would preclude Winchester

from every presenting new evidence demonstrating that its freight cars have obtained a tax situs elsewhere. In Winchester's 1981 tax case before the Virginia Supreme Court, it was expressly recognized that an intrastate railroad must be afforded the opportunity to rebut the presumption of taxability by demonstrating that its freight cars have obtained a tax situs outside Virginia. Acceptance of the Staff's collateral estoppel argument, however, would prevent Winchester from ever rebutting the presumption of taxability by demonstrating a tax situs elsewhere. Not only would this holding be unfair, but it would be entirely inconsistent with the prior decisions of the Commission and the Virginia Supreme Court. For these reasons, I find collateral estoppel does not bar

Winchester from presenting evidence designed to show that Virginia's taxation of all 323 cars was unconstitutional.

Rail Car Usage and Tax Situs

In Winchester v. Commonwealth, the Virginia Supreme Court held that it was reasonable to presume that an intrastate railroad has only enough cars to render public service in Virginia and that the railroad is habitually using all of its own cars in Virginia for that purpose. The Court further held that the Commission may reasonably presume that, to the extent an intrastate railroad does not use its own cars in Virginia, it uses the cars of other railroads which are in effect substitutes for its own. Simply put, the rule established by Winchester is that all of an intrastate railroad's

freight cars are presumed taxable.

The Court further held, however, that an intrastate railroad must be afforded the opportunity to rebut the presumption of taxability. Two different methods were established by the Court to rebut the presumption:

(1) the railroad can demonstrate that the average amount of its rolling stock habitually used in Virginia, including the cars of other railroads, is less than the total amount of its own rolling stock, or

(2) it can demonstrate that some of its cars have established a tax situs outside Virginia.

For obvious reasons, Winchester did not seek to rebut the presumption of taxability by the first method. This would appear to be an almost impossible

task for Winchester since the shipping records from Unimin's Gore, Virginia plant reveal that literally hundreds of cars owned or leased by other railroads were habitually used in Virginia. In short, it appears that Winchester would have little or no success in attempting to rebut the presumption of taxability under the first method.

Therefore, the primary issue in this case is whether Winchester has rebutted the presumption of taxability under the second method by demonstrating that some of its freight cars had acquired a tax situs outside Virginia. After reviewing the evidence and applicable case law, I find that Winchester has met its burden of proof. Now let me explain why.

The U. S. Supreme Court has decided numerous cases addressing the taxing

power of states with respect to property used in interstate commerce.[4]. In New York v. Miller, 202 U.S. 584, to L. Ed. 1155 (1906), the Supreme Court upheld the constitutionality of New York's tax on

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[4] See Southern P. Co. v. Kentucky, 222 U.S. 63, 56 L. Ed. 96 (1911); Johnson Oil Ref. Co. v. Oklahoma, 290 U.S. 158, 78 L. Ed. 238 (1933); Northwest Airlines, Inc. v. Minnesota, 322 U.S. 292, 88 L. Ed. 1283 (1944); Ott v. Mississippi Valley Barge Line Co., 336 U.S. 169, 93 L. Ed. 585 (1949); Standard Oil Co. v. Peck, 342 U.S. 382, 96 L. Ed. 427 (1952); Braniff Airways, Inc. v. Nebraska, 347 U.S. 590, 98 L. Ed. 967 (1954); Central Railroad Co. v. Pennsylvania, 370 U.S. 607, 8 L. Ed. 2d 720 (1962).

the full value of a railroad's rolling stock, even though a considerable portion of the rolling stock was always outside the state. In New York, the U. S. Supreme Court established the general rule that a domiciliary state, such as Virginia, can legitimately tax all of a railroad's rolling stock regardless of its location without offending the commerce and due process clauses of the U. S. Constitution. This general rule, however, is subject to a very important exception.

If a taxpayer can establish that some of its rolling stock has acquired an actual tax situs outside the domiciliary state, the general rule does not apply. The Supreme Court held that it would be unconstitutional for a domiciliary state to tax property that had acquired a tax situs in another

state. Central Railroad v. Pennsylvania, 370 U.S. 607, 8 L. Ed. 2d. 720 (1962). Further, it is not necessary for the taxpayer to prove that its rolling stock is actually taxed in the nondomiciliary state. It is only necessary to show that the nondomiciliary state could have taxed the railroad's rolling stock. Actual payment of tax is not required. Id. at 614.

In Central Railroad, the Supreme Court described two methods by which tax situs can be established outside a domiciliary state: (1) show that the rolling stock is operated over fixed routes and regular schedules outside the domiciliary state, or (2) show that the rolling stock, even though not operated over fixed routes or regular schedules, is "regularly, habitually

and/or continuously employed" in a state other than the domiciliary state. Id. at 615, quoting American Refrigerator v. Hall, 174 U.S. 70, 43 L. Ed. 899 (1899).

Under the facts presented in Winchester's current case, I am not convinced that Winchester established that its rolling stock operated over fixed routes on regular schedules in other states so as to acquire a tax situs outside Virginia. Car usage was dependent upon random customer orders occurring at anytime during 1981 and 1982. By no stretch of the imagination could these movements be characterized as shipments made pursuant to a regular schedule over regular routes. Shipments were based on random, unscheduled orders and the routes were regular only to the extent that the customer's place

of business could be reached only by operating over certain rail lines. In my opinion, Winchester has failed to demonstrate that its cars had acquired tax situs outside Virginia under the first method described by Central Railroad.

On the other hand, I believe Winchester's evidence established that over 235 of its freight cars were "regularly, habitually and/or continuously" employed in states other than Virginia during the years at issue. Based on the decisions of the U. S. Supreme Court, these cars cannot be taxed by Virginia. Taxation would violate the commerce and due process clause of the U. S. Constitution.

The word "habitually" has been defined as "customarily". The term does not imply that a freight car be

entirely or exclusively used in any one jurisdiction. Black's Law Dictionary, 640 (rev. 5th ed. 1979). All that is required to establish a tax situs is that a freight car be customarily used in a foreign jurisdiction during the normal course of business. If a regular and continuing pattern of usage can be established in another state, the ability to tax naturally follows.

Winchester's evidence demonstrates that during 1981 and 1982 each Unimin plant had a pool of Winchester cars assigned it for shipments of silica sand to customers. The cars, although bearing Winchester markings, had stenciled instructions requiring that each car be returned to a specific plant. Once a car was assigned, it would be used to ship sand to customers of a particular plant and then be

returned for additional shipments. The assignment of cars to each plant did not change by any significant degree during the years at issue. Finally, as Mr. Williams testified, Winchester's cars were almost always returned to the specific Unimin plant to which they were assigned unless there was a "glitch" in the system. Even then, the cars eventually found their way back to their assigned plant.

The record contains every Unimin shipping document for the tax years in question. Using a frequency standard of nine shipments in eight different months, Winchester has demonstrated that a substantial number of its cars were "regularly, habitually and/or customarily" used at Unimin plants outside Virginia. For tax year 1982,

for example, 67 cars[5] habitually and customarily served Unimin's Minnesota plants; 122 cars customarily served Unimin's Illinois plant; and 48 cars customarily served Unimin's New Jersey plants.

For tax year 1983, there was very little variance in car assignments with 69 cars serving the Minnesota plants, 123 cars serving the Illinois plant, and 45 cars serving New Jersey plants.

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[5] This figure is one car less than reported in Applicant's Amended Exh. No. 19 for Minnesota in 1981. As the Staff pointed out in its brief, Car No. 2008 was destroyed and not in use during 1981. Therefore, it was impossible for this car to be used at Unimin's Minnesota plant during 1981 or 1982.

Although the Staff questioned the accuracy of the exhibits, I find the exhibits are substantially accurate and represent a fair and reasonable description of car usage. As previously mentioned, the U. S. Supreme Court has held that a domiciliary state can tax all of a railroad's rolling stock, as a general rule. Therefore, the Commission's refusal to correct Winchester's 1981 rolling stock tax was proper. In that case, Winchester did not present any evidence demonstrating that its cars had acquired a tax situs elsewhere. Virginia was therefore entitled to rely on the general rule established by the U. S. Supreme Court in New York v. Miller and assess all of Winchester's 323 cars in 1981.

In the present case, however, Winchester's evidence is more detailed

and persuasive. I believe Winchester has demonstrated that many of its freight cars had acquired a tax situs outside Virginia during 1981 and 1982. Specifically, I find the evidence reveals that 237 Winchester cars acquired a tax situs outside of Virginia during 1981 and 1982. Since Winchester has a total of 323 cars, Virginia can constitutionally tax the balance amounting to 86 cars for tax year 1982 and 1983.

Freight Car Valuation

The final argument advanced by Winchester is that the Commission overvalued its freight cars in violation of Article X, Section 2 of the Constitution of Virginia. That article and section of the Constitution requires that all tax assessments be based on the property's fair market

value. Winchester claimed the Commission's use of original cost of the equipment less a depreciation factor (the cost-less-depreciation method) does not produce a fair market value for Winchester's freight cars as required by the Virginia Constitution.

In addressing this issue, it is helpful to consider certain guidelines established by the Virginia Supreme Court. In past cases, the court has held that tax assessments are presumed correct and the taxpayer has the burden of showing an assessment is excessive, Norfolk and Western Railway Co. v. Commonwealth, 211 Va. 692, 179 S.E.2d 623 (1971), or that the methodology used to arrive at an assessment in incorrect, R.F.&P. Railroad v. SCC, 219 Va. 301, 247 S.E.2d 408 (1978). Further, although the cost-less-

depreciation method has been approved, it has been held that this method should be employed only in those cases where competent market data of comparable sales is unavailable. Lake Monticello Service Co. v. Board of Supervisors, 233 Va. 111, 353 S.E.2d 767 (1987).

Winchester's valuation witness, Mr. Nelson, compiled extensive and detailed data relating to national market trends in freight car ownership by major car type. All of this evidence, however, can be summarized into one simple proposition: when there is an excess supply of freight cars, fair market value decreases. This is a relatively simple and accurate economic concept. Although I agree with this premise as a general rule, I find Mr. Nelson's appraisal is flawed and must be

rejected for several reasons.

First, Mr. Nelson's market valuation analysis is immediately suspect because it does not consider the age of Winchester's freight cars. Although he assumed the freight cars to be in excellent condition, there is no indication in his analysis that be considered the specific age of Winchester's cars when making his appraisal. Rather, it appears that all freight cars of a particular type, regardless of age, were placed in one broad category and an appraisal was made based on the <u>average value</u> of all cars nationwide. This is improper.

The problem with this appraisal method is apparent on its face. A 1987 automobile, for example, has a higher fair market value than an earlier model of the same make even though both are

in "excellent condition." Mr. Nelson's analysis, however, fails to consider the crucial factor of age when assessing fair market value.

An additional problem with the appraisal is that it fails to distinguish between the various sizes of covered hopper cars or equipped and unequipped box cars. For example, Mr. Nelson valued an average covered hopper car at $17,799 as of December 31, 1981, and $13,017 as of December 31, 1982. The evidence reveals, however, that Winchester owned two hundred twenty-four 3,650-ton covered hopper cars and seventy-five 3,000-ton covered hopper. No distinction in fair market value was made for purposes of his appraisal to account for the difference in size or capacity of Winchester's cars. Common sense dictates that a car

with a larger capacity has a greater fair market value than a smaller car. Likewise, the appraisal made no distinction in fair market value between equipped and unequipped box cars, even though Winchester leases both types of cars.

An appraisal of property owned by a public service company must be based on the specific property owned by the company. It is of little help to assess the fair market value of a public service company's property based on the value of an <u>average car</u> regardless of age or other physical characteristics. The rolling stock tax is based on the specific property owned by a taxpayer, not the value of an average car without regard to age, capacity or other physical characteristics.

Of course, the best evidence to demonstrate the fair market value of Winchester's freight cars would be evidence relating to comparable sales of freight cars similar in age and physical characteristics to Winchester's cars occurring during 1981 and 1982. No evidence of such comparable sales was presented, however. I therefore find that Winchester has failed to meet its burden of proof on the valuation issue. The Commission's methodology to determine the fair market value of Winchester's cars must be approved for purposes of this case.

CONCLUSION

In summary, I find that Winchester's rolling stock tax assessment should be corrected for tax years 1982 and 1983. Specifically, I

find that Winchester's rolling stock tax should be based on 86 freight cars in 1982 and 86 freight cars in 1983. Accordingly, Winchester's rolling stock tax assessment should be reduced to $30,229.40 for 1982 and $28,428.80 for 1983, calculated as follows:

1982

86/323	cars in Va. / total cars = 26.6%
$10,371,700	(Staff's FMV of 323 cars) x 26.6% = $2,758,872
$ 2,758,872	corrected FMV of Va. freight cars
+ 264,068	FMV of other property as per Staff
$ 3,022,940	total FMV of all rolling stock
x .01	tax rate
$ 30,229.40	total 1982 rolling stock tax

1983

86 / 323	cars in Va. / total cars = 26.6%
$ 9,761,600	(Staff's FMV of 323 cars) x 26.6% = $2,596,586
$ 2,596,586	corrected FMV of Virginia cars
+ 246,294	FMV of other property as per Staff
$ 2,842,880	total FMV of all rolling stock
.01	tax rate
$ 28,428.80	total 1983 rolling stock tax

FINDINGS AND RECOMMENDATIONS

After considering the evidence in this case, I find that:

(1) The 1982 rolling stock tax assessment for Winchester and Western Railroad Company should be corrected;

(2) For tax year 1982, Winchester had only 86 freight cars subject to the Virginia rolling stock tax with a total fair market value, as of December 31, 1981, of $2,758,872;

(3) The total fair market value of all of Winchester's rolling stock for tax year 1982, including the 86 freight cars set forth in finding (2), was $3,022.940 as of December 31, 1981;

(4) Winchester's rolling stock tax assessment for tax year 1982 should be reduced to $30,299.40;

(5) The 1983 rolling stock tax assessment for Winchester should also be corrected;

(6) For tax year 1983, Winchester had 86 freight cars subject to the Virginia rolling stock tax with a total fair market value, as of December 31, 1982, of $2,596,586;

(7) The total fair market value of all of Winchester's rolling stock for tax year 1983, including the 86 freight cars set forth in finding (6) above, was $2,842,880 as of December 31, 1982;

(8) Winchester's rolling stock tax assessment for the tax year 1983 should be reduced to $28,428.80; and

(9) Interest should be assessed on the outstanding balance of the 1982 and 1983 tax assessments from the date of assessment to final payment by Winchester at the applicable interest rate prescribed by the Commission in its Final Order.

Accordingly, I RECOMMEND that the Commission enter an order that:

(1) Grants the application of Winchester and Western Railroad Company to correct its 1982 and 1983 rolling stock tax assessments;

(2) Adopts the findings in this Report; and

(3) Dismiss this case from the Commission's docket and passes the papers herein to the Commission's file

for ended causes.

COMMENTS

The parties are advised that any comments (Rule 5:15(e)) to this Report must be filed with the Clerk of the Commission in writing, in an original and fifteen (15) copies, within fifteen (15) days from the date hereof. The mailing address to which any such filing must be sent is Document Control Center, P.O. Box 2118, Richmond, Virginia 23216. Any party filing such comments shall attach a certificate to the foot of such document that copies have been mailed or delivered to all other counsel of record and to any party not represented by counsel.

Respectfully submitted,

Glenn P. Richardson
Hearing Examiner

Document Control Center is requested to mail or deliver a copy of this Report on October 2, 1987, to Flournoy L. Largent, Jr., Esquire, P.O. Box 808, Winchester, VA 22601; Joseph C. Shapiro, Esquire, c/o Unimin Corporation, 258 Elm Street, New Canaan, CT 06840; the Honorable Mary Sue Terry, Attorney General of Virginia, 101 North 8th Street, Richmond, VA 23219; Wayne N. Smith, Commission Counsel; and the Commission's Director of Public Service Taxation.

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 18th day of November, 1988.

Winchester and Western Railroad Company, Appellant,

against Record No. 880537
S.C.C. Case No. PST820003

State Corporation Commission, Appellee.

Upon an appeal of right from an order entered by the State Corporation Commission on the 5th day of January, 1988.

For reasons stated in writing and filed with the record, the Court is of opinion that there is no error in the order appealed from. Accordingly, the order is affirmed, The appellant shall

pay to the appellee damages according to law.

This order shall be certified to the State Corporation Commission.

A Copy,

Teste:

Clerk

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 13th day of January, 1989.

Winchester and Western Railroad Company, Appellant,

against Record No. 880537
S.C.C. Case No. PST820003

State Corporation Commission, Appellee.

Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 18th day of November, 1988 and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:

Clerk

COMMONWEALTH OF VIRGINIA

STATE CORPORATION COMMISSION

IN THE MATTER OF

WINCHESTER AND WESTERN RAILROAD COMPANY, A Virginia Corporation

APPLICATION FOR REVIEW AND

CORRECTION OF TAXES

Comes now the application, Winchester and Western Railroad Company, and applies for a review and correction of taxes assessed against it on May 14, 1982, pursuant to Code of Virginia, as amended, 1974 Replacement Volume, Section 58-672.

1. The application is a Virginia corporation.

2. On May 20, 1982, it received an assessment in the amount of one hundred six thousand three hundred fifty-seven dollars and sixty-eight cents

($106,357.68) as rolling stock tax and two hundred forty-nine dollars and ninety cents ($249.90) as a special tax.

3. On May 27, 1982, the applicant paid fourteen thousand four hundred ninety-five dollars and forty cents ($14,495.40) consisting of a payment of fourteen thousand two hundred forty-five dollars and fifty cents ($14,245.50) of rolling stock tax and the entire two hundred forty-nine dollars and ninety cents ($249.90) special tax.

4. On June 24, 1982, the applicant received a notice of delinquent state taxes due for the year 1982 in the amount of ninety-two thousand one hundred twelve dollars and eighteen cents ($92,112.18) and a penalty assessment of four thousand six hundred

five dollars and sixty-one cents ($4,605.61).

5. The applicant takes exception to the remaining ninety two thousand one hundred twelve dollars and eighteen cents ($92,112.18) in taxes and the four thousand six hundred five dollars and sixty-one cents ($4,605.61) in penalty on the grounds set forth below.

6. Such tax is not authorized pursuant to Code of Virginia, as amended, 1974 Replacement Volume, Sections 58-515 and 58-524(5), or any other section thereof.

7. Such tax has not been assessed only on the average amount of rolling stock habitually used by the applicant in the State of Virginia, as required pursuant to Code of Virginia, as amended, 1974 Replacement Volume, Section 58-524(5).

8. Such tax has not been assessed in accordance with the requirements of Code of Virginia, as amended, 1974 Replacement Volume, Section 58-515.

9. Such tax has been assessed on greater than the full value of the rolling stock of the applicant, contrary to the requirements of Code of Virginia, as amended, 1974 Replacement Volume, Section 58-515.

10. Such tax is not permitted in the absence of statutory authorization.

11. Such tax is impermissible under the Due Process Clause of the Fourteenth Amendment and the Commerce Clause of the United States Constitution.

12. Since such tax is not permitted, such penalty is not owed by the applicant.

WHEREFORE, your applicant respectfully prays that the aforesaid assessment be corrected.

WINCHESTER AND WESTERN
RAILROAD COMPANY

By: _____

JOSEPH C. SHAPIRO
General Counsel
Unimin Corporation
50 Locust Avenue
New Canaan, Connecticut
06840
Telephone: (203) 966-8880
Counsel for Winchester
and Western Railroad
Company

AFFIDAVIT

THE FOREGOING IS TRUE AND CORRECT:

Attest:

WINCHESTER AND
WESTERN RAILROAD
COMPANY

_____
Secretary

By_____
President

STATE OF CONNECTICUT,)
) ss:
COUNTY OF FAIRFIELD,)

This day personally appeared before me, the undersigned Notary Public, William J. Woods, Jr., and Mary Jane Lisenby, President and Secretary, respectively, of Winchester and Western Railroad Company, who, after being first duly sworn, each made oath that the statements contained in the foregoing application are true to the

best of his or her knowledge and belief.

Given under my hand this 9th day of August, 1982.

My commission expires _____.

_____
Notary Public

(SEAL)

COMMONWEALTH OF VIRGINIA

STATE CORPORATION COMMISSION

IN THE MATTER OF

WINCHESTER AND WESTERN RAILROAD COMPANY, A Virginia Corporation

APPLICATION FOR REVIEW AND

CORRECTION OF TAXES

Comes now the application, Winchester and Western Railroad Company, and applies for a review and correction of taxes assessed against it on May 13, 1983, pursuant to Code of Virginia, as amended, 1974 Replacement Volume, Section 58-672.

1. The application is a Virginia corporation.

2. On or about May 17, 1983, it received an assessment in the amount of one hundred thousand seventy-eight dollars and ninety-four cents

($100,078.94) as rolling stock tax and two hundred thirty-eight dollars and twenty cents ($238.20) as special taxes.

3. On May 26, 1983, the applicant paid fourteen thousand eight hundred thirty-seven dollars and sixty cents ($14,837.60) consisting of a payment of fourteen thousand five hundred ninety-nine dollars and forty cents ($14,599.40) of rolling stock tax and the entire two hundred thirty-eight dollars and twenty cents ($238.20) special taxes.

4. On or about June 18, 1983, the applicant received a notice of delinquent state taxes due for the year 1983 in the amount of eighty-five thousand four hundred seventy-nine dollars and fifty-four cents ($85,479.54) and a penalty assessment

of four thousand seventy-three dollars and ninety-eight cents ($4,273.98).

5. The applicant takes exception to the remaining eighty-five thousand four hundred seventy-nine dollars and fifty-four cents ($85,479.54) in taxes and the four thousand two hundred seventy-three dollars and ninety-eight cents ($4,273.98) in penalty on the grounds set forth below.

6. Such tax is not authorized pursuant to Code of Virginia, as amended, 1974 Replacement Volume, Sections 58-515 and 58-524(5), or any other section thereof.

7. Such tax has not been assessed only on the average amount of rolling stock habitually used by the applicant in the State of Virginia, as required pursuant to Code of Virginia, as amended, 1974 Replacement Volume,

Section 58-524(5).

8. Such tax has not been assessed in accordance with the requirements of Code of Virginia, as amended, 1974 Replacement Volume, Section 58-515.

9. Such tax has been assessed on greater than the full value of the rolling stock of the applicant, contrary to the requirements of Code of Virginia, as amended, 1974 Replacement Volume, Section 58-515.

10. Such tax is not permitted in the absence of statutory authorization.

11. Such tax is impermissible under the Due Process Clause of the Fourteenth Amendment and the Commerce Clause of the United States Constitution.

12. Since such tax is not permitted, such penalty is not owed by the applicant.

WHEREFORE, your applicant respectfully prays that the aforesaid assessment be corrected.

WINCHESTER AND WESTERN
RAILROAD COMPANY

By: _____

JOSEPH C. SHAPIRO
General Counsel
Unimin Corporation
50 Locust Avenue
New Canaan, Connecticut
06840
Telephone: (203) 966-8880
Counsel for Winchester
and Western Railroad
Company

AFFIDAVIT

THE FOREGOING IS TRUE AND CORRECT:

Attest: WINCHESTER AND WESTERN RAILROAD COMPANY

_____ By _____
Secretary President

STATE OF CONNECTICUT,)
) s.s.:
COUNTY OF FAIRFIELD,)

This day personally appeared before me, the undersigned Notary Public, William J. Woods, Jr., and Mary Jane Lisenby, President and Secretary, respectively, of Winchester and Western Railroad Company, who, after being first duly sworn, each made oath that the statements contained in the foregoing application are true to the best of his or her knowledge and belief.

Given under my hand this 8th day of July, 1983.

_____
Notary Public

My commission expires:

(SEAL)

COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION
AT RICHMOND, NOVEMBER 13, 1986

APPLICATION OF

WINCHESTER AND WESTERN RAILROAD COMPANY — CASE NO. PST820003

For review and correction of assessment for rolling stock tax - tax year 1982

APPLICATION OF

WINCHESTER AND WESTERN RAILROAD COMPANY — CASE NO. PST830001

For review and correction of assessment for rolling stock tax - tax year 1983

ORDER DIRECTING RESPONSE TO MOTION

On November 6, 1986, the Commission's staff moved to dismiss both applications. Copies of the motion were served on Winchester and Western Railroad Company's registered agent and on the Attorney General. The

Commission finds that the applicant and the Attorney General should have an opportunity to respond to the staff's motion. Accordingly,

IT IS ORDERED that any response to the motion to dismiss filed November 6, 1986, be filed on or before December 5, 1986.

ATTESTED COPIES of this order shall be sent to Edward R. Parker, Esquire, Registered Agent for Winchester and Western Railroad Company, 5511 Staples Mill Road, Richmond, Virginia 23228; to the Honorable Mary Sue Terry, Attorney General of Virginia, Supreme Court Building, 101 North 8th Street, Richmond, Virginia 23219; and to the Director of the Division of Public Service Taxation.

COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION
AT RICHMOND, DECEMBER 1, 1986

APPLICATION OF

WINCHESTER AND WESTERN RAILROAD COMPANY — CASE NO. PST820003

For review and correction of assessment for rolling stock tax - tax year 1982

APPLICATION OF

WINCHESTER AND WESTERN RAILROAD COMPANY — CASE NO. PST830001

For review and correction of assessment for rolling stock tax - tax year 1983

ORDER CONTINUING PROCEEDINGS

On November 26, 1986, Winchester and Western Railroad Company, responded to the Commission staff's motion to dismiss the captioned applications on the grounds that all issues had been resolved by the Virginia Supreme Court

in Winchester and Western Railroad v. Commonwealth, Record No. 860055 (Va. Sup. Ct. September 5, 1986) (mem.). The railroad states that it has noted an appeal of the decision in Record No. 860055 to the United States Supreme Court and requests that no further action be taken on these applications pending resolution of that appeal. The Commission finds that further proceedings in both applications should be deferred pending resolution of appeals in the prior case. Accordingly,

IT IS ORDERED that these cases be continued generally.

ATTESTED COPIES of this order shall be sent to Flournoy L. Largent, Jr., Esquire, P.O. Box 808, Winchester, Virginia 22601; to the Honorable Mary Sue Terry, Attorney General of

Virginia, Supreme Court Building, 101 North 8th Street, Richmond, Virginia 23219; and to the Commission's Director of Public Service Taxation.

COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION
AT RICHMOND, MARCH 2, 1987

APPLICATION OF

WINCHESTER AND WESTERN RAILROAD COMPANY — CASE NO. PST820003

For review and correction of rolling stock tax assessment - tax year 1982

APPLICATION OF

WINCHESTER AND WESTERN RAILROAD COMPANY — CASE NO. PST830001

For review and correction of rolling stock tax assessment - tax year 1983

ORDER SCHEDULING HEARING

Background

On August 4, 1982, the Winchester and Western Railroad Company (Winchester and Western or Company) applied under former §58-672 of the Code of Virginia for review and

correction of the rolling stock tax assessment based on the value of its rolling stock as of December 31, 1981. (Effective July 11, 1984, former §58-672 of the Code was recodified without any change bearing on this proceeding as §58.1-2670.) According to its application, the Winchester and Western had withheld payment of $92,112.18 in rolling stock tax assessed and due June 1, 1982, because the Commission had over valued its rolling stock. The application was assigned Case No. PST8200003 (1982 Application).

By application filed July 11, 1983, the railroad sought review and correction of its rolling stock tax assessment based on the value of rolling stock as of December 31, 1982. As in 1982, the Winchester and Western

withheld $85,479.54 from its rolling stock tax due June 1, 1983, on the grounds that the Commission had over-valued its rolling stock. This second application was assigned Case No. PST830001 (1983 Application).

Proceedings in both cases were deferred until final review of the Commission's decision in an earlier case, Petition of Winchester and Western Railroad company for Review and Correction of Tax Assessment Pursuant to Virginia Code §58-672, Case No. PST8100005. Final disposition of that appeal was made by the United States Supreme Court on January 17, 1987. On February 17, the Company advised the Commission that it wished to go forward with a hearing on these applications on a consolidated basis.

The Commission finds that the

public interest requires prompt disposition of these applications. We further find that the applications may be consolidated in the interest of efficiency without abridging the rights of the application.

The Motion to Dismiss

On November 6, 1986, the Commission's Staff moved to dismiss both applications on the grounds that collateral estoppel bars relitigation of the issues raised by the Winchester and Western. The Company's reasons for seeking correction of the assessments are set out in identical language contained in §§6 through 11 of the 1982 Application and the 1983 Application. According to the staff's motion, the Commission has fully considered these same arguments and decided against the

Winchester and Western in Case No. PST810005.

By orders entered in both cases on November 13, 1986, the Commission afforded the Company an opportunity to respond to the motions to dismiss the 1982 Application and the 1983 Application. In response to the motions, the Winchester and Western did not address the merits of the motions to dismiss but requested continued deferral of action pending review of Case No. PST810005 by the United States Supreme Court.

An application for review and correction of an assessment of property is required by §58.1-2670 of the Code to, "set forth with reasonable certainty the item or items, of which a review and correction is sought, and to the grounds of the complaint". The

staff has properly invoked Rule 5:16(d)(i) of our Rules of Practice and Procedure to challenge the legal grounds of the Winchester and Western applications. Rather than rule on the motion at this time, however, the Commission will direct the Company to amend its 1982 Application and 1983 Application to reflect the opinions of the Virginia Supreme Court entered after its review in Case No. PST810005 and the order of the United States Supreme Court finding no jurisdiction to review. After amendment of the applications, the Staff may reurge its motion challenging the legal sufficiency of the applications.

Procedural Matters

Although the motion to dismiss remains outstanding and may be considered at a later date, the

Commission will order necessary procedural steps looking toward a hearing on the applications. We find it appropriate to authorize a Hearing Examiner to conduct further proceedings. Accordingly,

IT IS ORDERED:

(1) That Case No. PST830001 be consolidated with Case No. PST820003 and all documents filed in Case No. PST830001 be transferred;

(2) That the Winchester and Western forthwith upon receipt of this order serve one (1) true copy of its 1982 Application and its 1983 Application on the Honorable Mary Sue Terry, Attorney General of Virginia, Supreme Court Building, 101 North 8th Street, Richmond, Virginia 23219 and certify such service to the Clerk of the Commission, Document Control Center,

P.O. Box 2118, Richmond, Virginia 23216;

(3) That on or before March 27, 1987, the Winchester and Western shall file an original and eight (8) copies of its amended application setting forth reasons for review and correction of its rolling stock tax assessments for tax year 1982 and tax year 1983 and serve a copy of the amended application on the Attorney General;

(4) That on or before April 10, 1987, any person desiring to protest the application, including the Attorney General, shall file an original and eight (8) copies of a notice to protest with the Clerk of the Commission and simultaneously serve one (1) copy on counsel to the Winchester and Western, Flournoy L. Largent, Jr., Esquire, P.O. Box 808, Winchester, Virginia 22601;

(5) That on or before May 1, 1987, the Winchester and Western shall file an original and eight (8) copies of prepared testimony and exhibits it intends to present at the hearing and simultaneously serve one (1) copy on each person filing a notice of protest;

(6) That on or before May 22, 1987, all protestants shall file an original and eight (8) copies of their protests and of the prepared testimony and exhibits they intend to present at the hearing and simultaneously serve one (1) copy of each on counsel to the Winchester and Western and on other protestants;

(7) That on or before June 12, 1987, the Commission staff shall file an original and eight (8) copies of prepared testimony and exhibits it expects to present at the hearing and

simultaneously serve one (1) copy on counsel to the Winchester and Western and on each protestant;

(8) That on or before June 22, 1987, the Winchester and Western shall file an original and eight (8) copies of any prepared rebuttal testimony and exhibits it expects to introduce at the hearing and simultaneously serve one (1) copy on each protestant;

(9) That a Hearing Examiner be assigned to conduct all further proceedings in this matter as provided by Rule 7:1 of the Commission's Rules of Practice and Procedure concluding with the Examiner's Report to the Commission of findings and recommendations;

(10) That a public hearing on these applications be held beginning at 10:00 a.m. on July 1, 1987, in the Hearing

Room, Third Floor, Jefferson Building, Bank and Governor Streets, Richmond, Virginia; and

(11) That interest continue to accrue as provided by law on all unpaid taxes and all unpaid penalties assessed by the Commission.

ATTESTED COPIES of this order shall be sent to Flournoy L. Largent, Jr., Esquire, P.O. Box 808, Winchester, Virginia 22601; to the Honorable Mary Sue Terry, Attorney General of Virginia, Supreme Court Building, 101 North 8th Street, Richmond, Virginia 23219; and to the Commission's Director of Public Service Taxation.

A True Copy
Teste:

Clerk of the
State Corporation Commission

COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION

APPLICATION OF

WINCHESTER AND WESTERN RAILROAD COMPANY — CASE NO. PST820003

For review and correction of rolling stock tax assessment - tax year 1982

APPLICATION OF

WINCHESTER AND WESTERN RAILROAD COMPANY — CASE NO. PST830001

For review and correction of rolling stock tax assessment - tax year 1983

AMENDED APPLICATION FOR REVIEW AND CORRECTION OF TAXES

Comes now the applicant, Winchester and Western Railroad Company ("Applicant"), and amended hereby its Application for Review and Correction of Taxes dated August 9, 1982, and filed with the State Corporation

Commission on August 11, 1982, under document control number 820810199 in case number PST820003 for review and correction of rolling stock tax assessment for tax year 1982, and its Application for Review and Correction of Taxes dated June 8, 1983, under document control number 830710214 in case number PST830001 for review and correction of rolling stock tax assessment for tax year 1983, each pursuant to the Code of Virginia, as amended, 1974 Replacement Volume, Section 58-672, as in effect on said respective dates. By order of the State Corporation Commission dated March 2, 1987, document control number 870210030, case number PST830001 was consolidated with case number PST820003, and Applicant was ordered to file an amended application for review

and correction of taxes.

Said applications for review and correction of taxes filed in 1982 and 1983 are hereby amended to read as follows:

1. Applicant is a Virginia corporation.

2. On or about May 20, 1982, Applicant received an assessment in the amount of One Hundred six thousand three hundred fifty-seven dollars and sixty-eight cents ($106,357.68) as 1982 rolling stock tax and Two hundred forty-nine dollars and ninety cents ($249.90) as a 1982 special tax.

3. On May 27, 1982, Applicant paid Fourteen thousand four hundred ninety-five dollars and forty cents ($14,495.40) consisting of a payment of Fourteen thousand two hundred forty-five dollars and fifty cents

($14,245.50) of rolling stock tax and the entire Two hundred forty-nine dollars and ninety cents ($249.90) 1982 special tax.

4. On or about June 24, 1982, Applicant received a notice of delinquent state taxes due for the year 1982 in the amount of Ninety-two thousand one hundred and twelve dollars and eighteen cents ($92,112.18) and an associated penalty assessment of Four thousand sic hundred five dollars and sixty-one cents ($4,605.61).

5. Applicant takes exception to the remaining Ninety-two thousand one hundred twelve dollars and eighteen cents ($92,112.18) of 1982 rolling stock tax and the associated Four thousand six hundred five dollars and sixty-one cents ($4,605.61) penalty on the grounds set forth in paragraphs 10

through 13 below.

6. On or about May 17, 1983, Applicant received an assessment in the amount of One hundred thousand seventy-eight dollars and ninety-four cents $100,978.94) as 1983 rolling stock tax and Two hundred thirty-eight dollars and twenty cents ($238.20) as a 1983 special tax.

7. On May 26, 1983, Applicant paid Fourteen thousand eight hundred thirty-seven dollars and sixty cents ($14,837.60) consisting of a payment of Fourteen thousand five hundred ninety-nine dollars and forty cents ($14,599.40) of 1983 rolling stock tax and the entire Two hundred thirty-eight dollars and twenty cents ($238.20) 1983 special tax.

8. On or about June 18, 1983, Applicant received a notice of

delinquent state taxes for for the year 1983 in the amount of Eighty-five thousand four hundred seventy-nine dollars and fifty-four cents ($85,479.54) and an associated penalty assessment of Four thousand two hundred seventh-three dollars and ninety-eight cents ($4,273.98).

9. Applicant takes except to the remaining Eighty-five thousand four hundred seventy-nine dollars and fifty-four cents ($85,479.54) of 1983 rolling stock tax and the associated Four thousand two hundred seventy-three dollars and ninety-eight cents ($4,273.98) penalty on the grounds set forth in paragraphs 10 through 13 below.

10. Such tax has been assessed on greater than the full value of the rolling stock of Applicant, contrary to

the requirements of Code of Virginia, as amended, 1974 Replacement Volume, Section 58-515, as then in effect. Pursuant to said Section 58-515, the assessed full value must be construed as the fair market value of the rolling stock, which is the price it would bring when it is offered for sale by one who desires, but is not obligated, to sell it, and is bought by one under no necessity of having it. This construction of the term "full value" in said Section 58-515 is the only construction consistent with Article X, Section 2 of the Virginia Constitution.

11. Regardless of the language of Section 58-515 of the Code of Virginia, as amended, 1974 Replacement Volume, as then in effect, and regardless of the State Corporation Commission's administrative practices in

interpreting said Section 58-515, Applicant's rolling stock must be valued at no more than the fair market value thereof pursuant to Article X, Section 2 of the Virginia Constitution.

12. Such tax is unconstitutional for repugnancy to the Due Process Clause of the Fourteenth Amendment of the United States Constitution, and repugnancy to the Commerce Clause of the United States Constitution. Virginia is without constitutional power to impose the entire contested portion of the rolling stock tax for the years 1982 and 1983 because each of the railcars as to which that contested portion of the tax has been imposed could have been taxed, consistent with the requirements of the United States Constitution, in one of the states of Illinois, Minnesota and New Jersey in

the year in question, had such states enacted tax statutes calling for the taxation of said railcars.

13. Since such tax is not permitted, such penalty is not owned by Applicant.

WHEREFORE, Applicant respectfully prays that the aforesaid assessments be corrected.

WINCHESTER AND WESTERN
RAILROAD COMPANY

By_____

JOSEPH C. SHAPIRO
c/o Unimin Corporation
258 Elm Street
New Canaan, Connecticut
06840
Telephone: (203) 966-8880
Counsel for Winchester
and Western Railroad
Company

AFFIDAVIT

THE FOREGOING IS TRUE AND CORRECT:

Attest: WINCHESTER AND WESTERN RAILROAD COMPANY

_____ By_____
Secretary President

STATE OF CONNECTICUT,)
) ss:
COUNTY OF FAIRFIELD,)

This day personally appeared before me, the undersigned Notary Public, David L. Williams and Mary Jane Lisenby, President and Secretary, respectively, of Winchester and Western Railroad Company, who, after being first duly sworn, each made oath that the statements contained in the foregoing application are true to the

best of his or her knowledge and belief.

Given under my hand this 25th day of March, 1986.

My commission expires:

_____
Donnamarie Martin
Notary Public

(SEAL)

IN THE
SUPREME COURT OF VIRGINIA
AT RICHMOND

WINCHESTER AND WESTERN
RAILROAD COMPANY

Appellant

v. Record No. 880537

COMMONWEALTH OF VIRGINIA
and
STATE CORPORATION
COMMISSION DIVISION OF
PUBLIC SERVICE TAXATION

Appellees

ASSIGNMENTS OF ERROR

This day came the Appellant, the Winchester and Western Railroad Company, by Counsel, and files its Assignments of Error in this proceeding:

1. The Hearing Examiner, in the above case, in his report dated October 2, 1987, found that of the 323

cars owned by the Winchester and Western Railroad Company, that over 235 of its freight cars were regularly, habitually and/or continuously employed in states other than Virginia during the years at issue, actually 237 cars acquired a tax situs outside of Virginia during the years 1981 and 1982, and therefore leaving a balance of 86 cars which can be constitutionally taxed by the Commonwealth of Virginia for tax years 1982 and 1983.

In the case of Central Railroad v. Pennsylvania, 370 U.S. 607, 8 L. Ed. 2d. 720 (1962), the Supreme Court held that it was not necessary that the tax payers rolling stock be taxed in the nondomiciliary state to preclude taxation by the state of domicile.

The Commission erred in its Opinion and Order dated January 5, 1988, by not

adopting the findings of fact by the Hearing Examiner and by not following the holding in the aforesaid case.

2. The Commission in its Opinion and Order dated January 5, 1988, states "that they were not persuaded that the extensive interstate and foreign operations of Unimin establishes tax situs outside Virginia for specific cars owned by a Virginia domiciliary railroad with all of its track in Virginia".

The evidence introduced before the Hearing Examiner in this case, not only shows where the 237 cars were located but established the fact that they were not in the Commonwealth of Virginia.

The Commission continues to take a position contrary to the holding in the Central Railroad Company case and further bases the taxation of rolling

stock on the fact that all of the Appellant's track is located in Virginia. This position is not supported by Statute and is not consistent with constitutional requirements.

Respectfully submitted,

WINCHESTER AND WESTERN RAILROAD COMPANY

By: _____
Counsel

Flournoy L. Largent, Jr., Esquire
38 Rouss Avenue
Winchester, Virginia 22601
(703) 665-4378
Counsel for Appellant

Dated: June 6, 1988

C E R T I F I C A T E

I do hereby certify that the name of the Appellant is the Winchester and Western Railroad Company and that Counsel for the Appellant is Flournoy L. Largent, Jr., Esquire, 38 Rouss Avenue, P.O. Box 808, Winchester, Virginia, 22601, (703) 655-4378. The name of the Appellees are the Commonwealth of Virginia, whose Counsel is The Honorable Mary Sue Terry, Attorney General, Supreme Court Building, Richmond, Virginia, 23219, (804) 786-0080, and the State Corporation Commission, Division of Public Service Taxation, whose Counsel is Wayne N. Smith, Esquire, State Corporation Commission, P.O. Box 1197, Richmond, Virginia 23209, (804) 786-8671 and Lewis S. Minter, Esquire,

State Corporation Commission, P.O. Box 1197, Richmond, Virginia, 23209, (804) 786-8671.

I further certify that all parties to this proceeding are represented by Counsel and that a true and correct copy of the foregoing Assignments of Error was mailed to all opposing Counsel, on the 6th day of June, 1988.

_____

Flournoy L. Largent, Jr.

Applicant's Exhibit No. 45

COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION

IN THE MATTER OF APPLICATION OF

WINCHESTER AND
WESTERN RAILROAD
COMPANY CASE NO. PST820003

For review and
correction of rolling
stock tax assessment -
tax year 1982

APPLICATION OF

WINCHESTER AND
WESTERN RAILROAD
COMPANY CASE NO. PST830001

For review and
correction of rolling
stock assessment -
tax year 1983

AMENDED PREPARED TESTIMONY OF
DAVID L. WILLIAMS
IN NARRATIVE FORM

Comes now the applicant, Winchester and Western Railroad Company, and presents the amended prepared testimony of David L. Williams in narrative form

to be presented at the hearing scheduled for July 1, 1987, amending and superseding the prepared testimony of David L. Williams in narrative form filed with the State Corporation Commission on May 8, 1987.

I am David L. Williams. I am employed by Unimin Corporation, the parent company of Winchester and Western Railroad Company.

I serve as President of Winchester and Western Railroad Company, and I serve as Vice President/Distribution and Customer Service of Unimin Corporation.

I have been employed by Unimin Corporation since October 20, 1980, serving as Director/Traffic from that date in 1980 until April 1, 1982 when I was promoted to the position of General Manager/Distribution. I served in that

position until April 30, 1984, when I assumed the position of Vice President/Distribution and Customer Service, the position with Unimin Corporation which I presently hold.

I was first elected to serve a position with Winchester and Western Railroad Company on May 14, 1981 when I was elected to the position of Vice President/Traffic. I continued to serve in that position with the railroad until April 14, 1983 when I was elected Vice President/Distribution of Winchester and Western Railroad Company. I continued in that position with the railroad until July 23, 1986 when I was elected President of Winchester and Western Railroad Company, the position I presently hold.

In all three positions I have held with Unimin Corporation, I have been

responsible for supervising the distribution of Unimin Corporation's products. During the period in question, which is 1981 and 1982, Unimin Corporation's exclusive product was silica sand sold both in granular and pulverized form. In those three positions I have been responsible for working with each Unimin Corporation plant to make sure the plant has an effective system for shipping its silica sand in rail cars in a timely manner, and maintains adequate records of those shipment.

In my positions of Vice President/Traffic and Vice President/ Distribution of Winchester and Western Railroad Company, I was responsible for interfacing with the railroad's shippers.

Until 1986, Winchester and Western

Railroad Company solely operated eighteen miles of track, located entirely in Virginia, running between the small town of Gore and the city of Winchester. In 1986, Winchester and Western Railroad Company acquired and began operating rail in three additional states. Until 1986, the practically exclusive shipper shipping its product on the Winchester and Western Railroad was Unimin Corporation, which shipped its silica sand from Gore to be interchanged with the Baltimore and Ohio Railroad or Conrail in Winchester, where it would move on to final destinations.

In late 1978 and in 1979, Unimin Corporation owned directly, or through subsidiaries, four plants, each of which produced silica sand, either in granular or in both granular and

pulverized form, as its sole product. Three plants were owned directly by Unimin Corporation. Those were located in Gore, Virginia; Ottawa, Minnesota; and Crystal City, Missouri. The fourth plant was owned by a subsidiary of Unimin Corporation, called Unisil Corporation, and was located in Millville, New Jersey.

In late 1978 and in 1979, the rail carriers serving those three plants outside of Virginia, as well as the Baltimore and Ohio and Conrail which provided cars for use on the Winchester and Western Railroad line serving the Gore, Virginia plant, all experienced severe shortages of freight cars. As a result, Unimin Corporation and Unisil Corporation were required to substantially delay many shipments of silica sand to their customers.

In order to alleviate this rail car shortage problem, in late 1979 and early 1980, the Winchester and Western Railroad Company acquired by long term lease a total of 325 freight cars, broken down as follows. Two hundred twenty-five cars were 4,000 ton capacity covered hopper cars, suitable for shipping bulk silica sand. Seventy-five cars were 3,000 ton covered hopper cars, suitable for shipping bulk silica sand. And twenty-five cars were standard fifty foot box cars, suitable for shipping bagged silica sand. One of those twenty-five box cars and one of those 4,000 ton capacity covered hopper cars were destroyed in accidents off our line during 1980, and it is the remaining three hundred twenty-three cars whose taxation is at issue in this

case. The years at issue in this tax case concern the railroad's rail car valuations and rail car usages during the years 1981 and 1982, so I will discuss first how Unimin's plants changed during that period, and then I will discuss how rail car usages were closely associated with Unimin Corporation and Unisil Corporation plants.

In January 1980, Unimin Corporation's existing plant in Ottawa, Minnesota was permanently replaced with a new plant at the same site.

In February 1980, Unimin Corporation acquired a fifth plant, by Unimin Corporation's purchase of a company called Bellrose Silica Company, whose silica sand plant was located in Utica, Illinois. Before the end of 1980, there was a corporate merger

merging Bellrose Silica Company into Unimin Corporation, with Unimin Corporation being the surviving company of the merger, so that by 1981, the Utica, Illinois plant was directly part of Unimin Corporation. That plant also experienced significant rail car shortages from and even before the time Unimin Corporation acquired it in February 1980.

Once the Winchester and Western Railroad Company took delivery of the 325 rail cars, the cars were assigned to four of these five Unimin Corporation and Unisil Corporation plants. No cars were assigned to the Crystal City, Missouri plant, because the cars were too long to negotiate a curve in a tunnel at that site.

During 1980, when all the 325 cars were delivered to the railroad, the

railroad assigned all of these cars, with the exception of some of the box cars, to these Unimin Corporation and Unisil Corporation plants in Gore, Virginia; Millville, New Jersey; Ottawa, Minnesota; and Utica, Illinois. These assignments of cars were long term assignments, with each of those four plants having a pool of Winchester and Western rail cars which would be used solely to ship silica sand to the customers of that plant, and would then return directly to the plant for additional shipments. Because of the newness of this car assignment process, some changes in the size of the pools of rail cars assigned to each of these four plants was made during the year 1980. However, in 1981, the situation had stabilized and car pools assigned to each plant were

rarely changed. By 1982, there were no changes in the assigned pools of Winchester and Western rail cars to Unimin Corporation plants.

During the late 1980 and early 1981 period, Unimin Corporation opened a new plant, which then substituted for one of the existing plants which was permanently closed shortly thereafter. In December 1980, Unimin Corporation began shipping silica sand out of its newly constructed plant in Dividing Creek, New Jersey. As the Dividing Creek plant geared up from a one shift operation to a three shift operation over a few months, the Unisil Corporation silica sand plant in Millville, New Jersey a few miles away shut down, making its final shipment of silica sand in March 1981. As a result, the pool of cars which had

formerly served the Millville, New Jersey plant was assigned to serve the Dividing Creek, New Jersey plant.

Unimin Corporation added a sixth silica sand plant at the end of June, 1982, in Kasota, Minnesota. Throughout the remainder of 1982, this plant operated on a rather small scale. It is located only a few miles from Unimin Corporation's Ottawa, Minnesota plant. In 1982, the Kasota, Minnesota plant served to relieve the Ottawa, Minnesota plant of some of its backlog of orders. Therefore, adjustments in assigned rail car pools were not needed, and the pool of Winchester and Western rail cars assigned to the Ottawa, Minnesota plant also served the much smaller needs of the nearby Kasota, Minnesota plant.

Throughout this 1981 and 1982

period, these Unimin Corporation and Unisil Corporation plants maintained records of each rail car shipment out of the plant. In addition, the Winchester and Western Railroad Company office in Winchester, Virginia maintained records of all rail traffic interchange in Winchester with either the Baltimore and Ohio or Conrail.

In order to determine Winchester and Western Railroad Company's rail car usage during 1981 and 1982, under my supervision, I have had my staff at Unimin Corporation assemble records from these plants in Illinois, Minnesota and New Jersey showing daily railroad shipments during that two year period, and I have provided to my Unimin Corporation staff records in possession of the Winchester and Western Railroad Company in Winchester,

Virginia concerning 1981 and 1982 rail traffic on that 18-mile line. Based on a careful day-by-day examination of these records, under my direction, we have prepared an equipment utilization report for 1981 and an equipment utilization report for 1982, both of which I will introduce into evidence later. These two reports track each of the 323 Winchester and Western Railroad Company freight cars, and show which of the following plants previously mentioned shipped silica sand in that rail car during each month of the applicable year. The six plants are Gore, Virginia plant; the Millville, New Jersey plant; the Dividing Creek, New Jersey plant; the Utica, Illinois plant; the Ottawa, Minnesota plant; and the Kasota, Minnesota plant.

Before I introduce these two car

utilization reports into evidence, I will first describe and introduce into evidence the primary source materials, showing day-by-day shipments, which we used for preparation of those car utilization reports.

I present as Applicant's Exhibit No. 1 a book entitled "Ottawa, Minnesota 1981 Shipping Sheets". On these sheets plant personnel at Unimin Corporation's Ottawa, Minnesota plant recorded each shipment of silica sand, and the vehicle in which the silica sand was shipped. Any sand shipped in a Winchester and Western rail car can be identified by the particular car number.

I present as Applicant's Exhibit No. 2 a book entitled "Ottawa, Minnesota Shipping Sheets January 1, 1982 to April 30, 1982". This

Applicant's Exhibit No. 2 was prepared for Unimin Corporation's Ottawa, Minnesota plant in a similar fashion as Applicant's Exhibit No. 1, but with respect to the first four-month period during 1982.

I present as Applicant's Exhibit No. 3 a book of computer printouts entitled "Ottawa, Minnesota Computerized Shipping Sheets May 1, 1982 to December 31, 1982." The information in this Applicant's Exhibit No. 3 for Unimin Corporation's Ottawa, Minnesota plant is comparable to the information in Applicant's Exhibits Nos. 1 and 2, except that the information was inputted into Unimin Corporation's computer at Unimin Corporation's head office in Connecticut, and then printed out in computer printout form. This shows all

shipments for the period May 1, 1982 to December 31, 1982 from the Ottawa, Minnesota plant.

I present as Applicant's Exhibit No. 4 a book entitled "Kasota, Minnesota 1982 Shipping Sheets". These shipping sheets are comparable to the shipping sheets shown in Applicant's Exhibits Nos. 1 and 2, and were prepared in a similar fashion, except the shipping sheets represented by Applicant's Exhibit No. 4 contain all shipments in 1982 for Unimin Corporation's Kasota, Minnesota plant rather than the Ottawa, Minnesota plant.

I present as Applicant's Exhibit No. 5 a book entitled "Utica, Illinois 1981 Car Release Reports" which was prepared by the sole railroad serving Unimin Corporation's Utica, Illinois

plant, the Baltimore and Ohio Railroad. The reports prepared by the Baltimore and Ohio were regularly sent to the Utica, Illinois plant, and maintained by the plant, which audited them to make certain they were consistent with the plant's other records of daily car usage. This Applicant's Exhibit No. 5 shows the time and date each rail car was placed by the Baltimore and Ohio on the sidetrack of Unimin Corporation at the Utica, Illinois plant, and the time and date the Baltimore and Ohio took the car out of the plant to move it outbound.

I present as Applicant's Exhibit No. 6 a book entitled "Utica, Illinois Plant Rail Car Cards 1982". At the Unimin Corporation plant in Utica, Illinois rail car usage was recorded by

keeping a separate small card for each rail car in which silica sand was ever shipped. On each card was noted the date on which silica sand was shipped. Applicant's Exhibit No. 6 is a book consisting of all the cards for all Winchester and Western Railroad Company rail cars which were used to ship silica sand from the Utica, Illinois plant for the year 1982.

I present as Applicant's Exhibit No. 7 a book entitled "Dividing Creek, New Jersey Daily Shipping Log January 1, 1981 to June 30, 1981". This Applicant's Exhibit No. 7 consists of a compilation of the daily log for that six month period maintained by the staff of Unimin Corporation's Dividing Creek, New Jersey plant showing each shipment of silica sand made at that plant, and in the case of shipments

made by rail car, showing the rail car in which the shipment was made.

I present as Applicant's Exhibit No. 8 a book entitled "Dividing Creek, New Jersey Rail Shipment Log July 1, 1981 to December 31, 1981". This Applicant's Exhibit No. 8, also prepared with respect to Unimin Corporation's Dividing Creek, New Jersey plant by the staff of that plant, consists of a daily log of all rail shipments from that plant during this six-month period.

I present as Applicant's Exhibit No. 9 a book entitled "Dividing Creek, New Jersey Daily Shipping Log January 1, 1982 to March 31, 1982". This Applicant's Exhibit No. 9, prepared with respect to Unimin Corporation's Dividing Creek, New Jersey plant, is substantially similar to Applicant's

Exhibit No. 7, and was prepared in the same fashion, except that it is for the first three-month period in the year 1982.

I present as Applicant's Exhibit No. 10 a book entitled "Dividing Creek, New Jersey Daily Shipping Log April 1, 1982 to June 30, 1982". This Applicant's Exhibit No. 10, also prepared with respect to Unimin Corporation's Dividing Creek, New Jersey plant, is substantially similar to Applicant's Exhibit Nos. 7 and 9, and was prepared in the same fashion, except that it is for the second three-month period in the year 1982.

I present as Applicant's Exhibit No. 11 a book entitled "Dividing Creek, New Jersey Daily Shipping Log July 1, 1982 to September 30, 1982". This Applicant's Exhibit No. 11, also with

respect to Unimin Corporation's Dividing Creek, New Jersey plant, is substantially similar to Applicant's Exhibit Nos. 7, 9 and 10, and was prepared in the same fashion, except that it is for the third three-month period in 1982.

I present as Applicant's Exhibit No. 12 a book entitled "Dividing Creek, New Jersey Daily Shipping Log October 1, 1982 to December 31, 1982". This Applicant's Exhibit No. 12, also with respect to Unimin Corporation's Dividing Creek, New Jersey plant, is substantially similar to Applicant's Exhibit Nos. 7, 9, 10 and 11, and was prepared in the same fashion, except that it is for the final three-month period in 1982.

I present as Applicant's Exhibit No. 13 a book entitled "Millville, New

Jersey 1981 Shipping Sheets". This Applicant's Exhibit No. 13, prepared by personnel of Unisil Corporation's Millville, New Jersey plant, and maintained in the records of Unimin Corporation, consists of daily shipping sheets showing each shipment of silica sand from the Millville, New Jersey plant, and in the case of rail shipments, identifying the rail car, from the beginning of January 1981 until the plant closed permanently in March 1981.

I present as Applicant's Exhibit No. 14 a book entitled "Gore, Virginia 1981 Demurrage Reports". This Applicant's Exhibit No. 14 contains reports prepared on a daily basis by Winchester and Western Railroad Company showing when rail cars were delivered by the railroad to the Unimin

Corporation plant in Gore, Virginia, and when they were returned by Unimin Corporation to the railroad, as they were used for movements of silica sand freight.

I present as Applicant's Exhibit No. 15 a book entitled "Winchester, Virginia 1982 B & O Junction Settlement Statements". This Applicant's Exhibit No. 15 is a daily report which was prepared by the Baltimore and Ohio Railroad in Winchester, Virginia, and regularly delivered to the Winchester and Western Railroad Company in Winchester, Virginia, which regularly verified the information. These reports were then maintained in the files of the Winchester and Western Railroad Company. These reports show all rail cars being transferred from Winchester and Western line to the

B & O line during 1982.

I present as Applicant's Exhibit No. 16 a book entitled "Winchester, Virginia 1982 Conrail Abstracts of Interline Waybills Received". This Applicant's Exhibit No. 16 includes a daily report which was prepared by Conrail in Winchester, Virginia, and regularly delivered to Winchester and Western Railroad Company in Winchester, Virginia, which regularly verified the information. These reports were then maintained in the files of the Winchester and Western Railroad Company. These reports show all rail cars being transferred from the Winchester and Western line to the Conrail line during 1982. Conrail and the Baltimore and Ohio were the only two lines to which rail cars on the Winchester and Western line could be

interchanged or switched.

These sixteen documents, Applicant's Exhibits Nos. 1 through 16, were examined on a page by page basis by my Unimin Corporation staff to determine where each Winchester and Western rail car was used, and the months in which it was used. That information was then put together by my staff in two reports, which we called "W & W Equipment Assignments 1981" and "W & W Equipment Assignments 1982".

I present as Applicant's Exhibit No. 17 that report entitled "W & W Equipment Assignments 1981".

I present as Applicant's Exhibit No. 18 that report entitled "W & W Equipment Assignments 1982".

The reports introduced as Applicant's Exhibits Nos. 17 and 18 show each Winchester and Western

freight car, and on a month by month basis the reports show whether it was used at the following locations: Winchester/Gore, Virginia (which means the eighteen mile stretch of track between Gore, Virginia and Winchester, Virginia); Millville, New Jersey; Dividing Creek, New Jersey; Utica, Illinois; Ottawa, Minnesota; or Kasota, Minnesota. There is a key at the beginning of each of Applicant's Exhibits Nos. 17 and 18 showing the abbreviations used in the reports.

From Applicant's Exhibits Nos. 17 and 18, my staff prepared summary reports entitled "W & W Equipment Utilization Summary - 1981 and 1982 - Illinois, Minnesota and New Jersey." I present as Applicant's Exhibit No. 19 that report entitled "W & W Equipment Utilization Summary - 1981 and 1982 -

Illinois, Minnesota and New Jersey". This Applicant's Exhibit No. 19 lists the numbers of the Winchester and Western rail cars which were habitually, regularly and continuously used in 1981 and 1982 in the states of Illinois, Minnesota and New Jersey.

As a cut-off standard, I only included rail cars on Applicant's Exhibit No. 19 if they met a frequency of utilization standard. That standard was at least nine different moves during the year at the particular location during eight different calendar months.

In Illinois in 1981, for example, 123 Winchester and Western freight cars met this utilization standard. In fact, all but one of those 123 rail cars met a more stringent utilization standard of at least eleven different

moves in at least nine different calendar months. Of these 123 Illinois rail cars, all but two were utilized for trips exclusively from Unimin Corporation's Utica, Illinois plant. Of those two rail cars, one car, WW 3144, was used once in Virginia and the other car, WW 3159, was used twice in Minnesota.

In New Jersey in 1981, 48 Winchester and Western freight cars met the utilization standard of being used in at least nine different moves in at least eight different calendar months. Actually, all 48 of these cars met the more than stringent utilization standard of eleven moves in nine different months, and none were utilized for trips from out of state. They all were utilized for trips exclusively from Unimin Corporation's

Dividing Creek, New Jersey plant or Unisil Corporation's Millville, New Jersey plant.

In Minnesota in 1981, 69 Winchester and Western freight cars were used at least nine different times in at least eight different calendar months. All but four of those freight cars moved at least eleven different times from Unimin Corporation's Ottawa, Minnesota plant in at least nine different months. Only one of those 69 rail cars was utilized for trips from outside of Minnesota, and that rail car, WW 3153, was so utilized three times for trips from Unimin's Gore, Virginia plant.

Looking at 1982, in Illinois 124 Winchester and Western freight cars met the utilization standard of being used nine different times in eight different calendar months. In fact, all 124

freight cars also met the more stringent utilization standard of being used in Illinois at least eleven different times in at least nine different months. In addition, all but one of those 124 rail cars were utilized for trips exclusively from Unimin Corporation's Utica, Illinois plant. That one car, WW 3149, was used for one trip from Unimin Corporation's Gore, Virginia plant.

In New Jersey in 1982, 45 Winchester and Western freight cars met the utilization standard of at least nine different moves in at least eight different calendar months. Like in Illinois, all of these freight cars met the more stringent utilization standard, and all were utilized for trips exclusively from Unimin's Dividing Creek, New Jersey plant.

In Minnesota in 1982, 69 Winchester and Western freight cars met the utilization standard of at least nine different moves in at least eight different calendar months. All but two of those 69 cars also met the more stringent utilization standard of at least eleven moves in at least nine different months from Unimin Corporation's Ottawa, Minnesota plant or Kasota, Minnesota plant. All 69 cars were utilized for trips exclusively from these two Minnesota plants.

The car numbers of the Winchester and Western Railroad Company freight cars are broken down, using these standards just discussed, in Applicant's Exhibit No. 19.

The 323 cars at issue in this case, as indicated earlier, are not owned by

Winchester and Western Railroad Company. Rather, they are leased by the railroad under two different long-term leases. Winchester and Western Railroad Company car numbers WW 1001 through WW 1075 and car numbers WW 2001 through WW 2025 were leased by the railroad pursuant to an Equipment Lease dated as of November 1, 1978 between First Security State Bank, as lessor, and Winchester and Western Railroad Company, as lessee. First Security State Bank, the owner of these 100 rail cars, is a Utah corporation with its principal place of business in Utah. One of those cars, WW 2008, was destroyed in 1980, prior to the years at issue in this case.

That lease provides for the lease by First Security State Bank to Winchester and Western Railroad Company

of those 100 cars for a term of 18 years. In its capacity as owner and as lessor, First Security State Bank acts as trustee for two investors. The first investor was Lease Investments Trust, a California trust which had its principal place of business in California. Lease Investments Trust acted as interim investor. The other beneficiary for which First Security State Bank acted as trustee is the permanent investor, Northwest National Life Insurance Company, a Minnesota corporation with its principal place of business in Minnesota. During the years at issue in this tax case, Northwestern National Life Insurance Company was the sole beneficiary of First Security State Bank's trust relationship under which First Security State Bank owned the 99 remaining rail cars.

Pursuant to an Amended and Restated Lease of Railroad Equipment dated as of October 1, 1979 between Merrill Lynch Leasing Inc., as lessor, and Winchester and Western Railroad Company, as lessee, Winchester and Western Railroad leased for 18 years from Merrill Lynch Leasing Inc. 225 cars, the car numbers of which were WW 3001 through WW 3225. One of those cars, WW 3191, was destroyed in 1980, prior to the years at issue in this case. At the time this lease was entered into, and throughout the tax years in question in this case, Merrill Lynch Leasing Inc. was a Delaware corporation with its principal place of business in New York.

As mentioned earlier in my testimony, the purpose for which the Winchester and Western Railroad Company

leased these 325 cars was to provide availa lity of freight cars for transportation of silica sand of its parent company, Unimin Corporation, principally outside the State of Virginia.

While the Winchester and Western Railroad Company was the actual lessee in these lease transactions, the transactions were arranged by the parent company, Unimin Corporation, and the entire credit standing behind the obligation to pay yearly rentals exceeding $1,300,000 was Winchester and Western's parent company, Unimin Corporation.

Winchester and Western Railroad Company's obligations under the November 1, 1978 Equipment Lease were unconditionally guaranteed by Unimin Corporation pursuant to a Guaranty

Agreement dated as of November 1, 1978. I present as Applicant's Exhibit No. 29 a copy of the Guaranty Agreement of Unimin Corporation dated as of November 1, 1978. Unimin Corporation is a Delaware corporation with its principal place of business in Connecticut.

Winchester and Western Railroad Company's obligations under the Amended and Restated Lease of Railroad Equipment dated as of October 1, 1979 were unconditionally guaranteed by Unimin Corporation pursuant to paragraph 10 of a Participation Agreement dated as of October 1, 1979 among Winchester and Western Railroad Company, Unimin Corporation, Merrill Lynch Leasing Inc., The Connecticut Bank and Trust Company, a Connecticut banking corporation with its principal

place of business in Connecticut, The Equitable Life Assurance Society of the United States, a Delaware corporation with its principal place of business in New York, and MLL Leasing Corp., a Delaware corporation with its principal place of business in New York.

I present as Applicant's Exhibit No. 30 a copy of that Participation Agreement dated as of October 1, 1978 among Winchester and Western Railroad Company, Unimin Corporation, Merrill Lynch Leasing Inc., The Connecticut Bank and Trust Company, The Equitable Life Assurance Society of the United States and MLL Leasing Corp.

Unimin Corporation acquired the Winchester and Western Railroad Company on October 7, 1977 by purchase through a subsidiary of all Winchester and Western Railroad Company's outstanding

stock for a cash purchase price of $100,000. That subsidiary was merged into Unimin Corporation in 1978, at which time Winchester and Western was directly owned by Unimin Corporation. At the time of the 1977 acquisition, Winchester and Western Railroad had regularly been losing money and had a negative net worth. I present as Applicant's Exhibit No. 31 Winchester and Western Railroad Company's financial report (unaudited) for the years ended December 31, 1977 and 1976, prepared by Young, Hyde and Company, certified public accountants of Winchester, Virginia. These financial statements were the regularly prepared financial statements of the Winchester and Western Railroad Company and have been retained as part of its regularly maintained business records. This

Applicant's Exhibit No. 31 shows that in the year 1977, the most recent full year available at the time the November 1, 1978 lease for 100 freight cars was entered into, Winchester and Western Railroad Company had a net loss of $62,345.64 on total revenues for the year of $273,288.66. At the end of the year 1977, Winchester and Western Railroad Company had a net worth below zero. It had a book net worth of negative $158,741.96.

The Railroad's financial situation continued to be bleak.

I present as Applicant's Exhibit No. 32 a sheet entitled "Winchester and Western Railroad Statement of Income Year End 1978", which is a regularly prepared and maintained income statement of the Railroad. This was the first year of complete Unimin

Corporation ultimate ownership of the Railroad. In that year, the Railroad had a loss of $189,207 on total revenues of $326,027. An annual loss equal to more than half of a company's revenues is staggering. Since Unimin Corporation made no capital contribution, the railroad's negative net worth declined further. Winchester and Western Railroad Company certainly was not credit worthy in 1978 to lease rail cars. This was the latest full-year income statement available when Winchester and Western Railroad Company entered into the lease dated as of October 1, 1979 for 225 freight cars.

The Railroad continued to show substantial losses in 1979, prior to the time the 1979 lease was entered into. I present as Applicant's Exhibit No. 33 a sheet entitled "Winchester and

Western Railroad Company Statement of Income First Quarter 1979", which is a regularly prepared and maintained income statement of the Railroad. This statement shows that the Railroad lost $67,815 on revenues of $107,008 that quarter.

I present as Applicant's Exhibit No. 34 a statement entitled "Winchester and Western Railroad Company Statement of Income Second Quarter 1979", which is a regularly prepared and maintained income statement of the Railroad. This statement shows that the Railroad lost $13,146 in the second quarter of 1979 on revenues of $160,600. This was the most recently prepared income statement as of the time the Railroad entered into the second lease. Again, the Railroad was clearly not credit worthy enough to enter into a long-term lease

for any equipment, much less an additional 225 cars. In 1979, Unimin Corporation again did not provide any capital contribution to the Winchester and Western, so the railroad's negative net worth continued its decline.

The entire credit worthiness of the lease transaction consisted of the guaranty by the parent company, Unimin Corporation.

I present as Applicant's Exhibit No. 35 "Consolidated Financial Statements for the Years Ended December 31, 1978 and 1977 and Auditors' Opinion of Unimin Corporation and Subsidiaries" prepared by Deloitte Haskins & Sells, and dated February 28, 1979. These were the most recent audited financial statements available when the 225 cars were leased in 1979. This report also shows the audited financials for 1977

available when the original 100 cars were leased in 1978. As shown in the audit report, Unimin Corporation and subsidiaries had consolidated income in 1977 of $706,654 on revenues of $10,525,093. In 1978, earnings improved to $1,009,406 on revenues of $13,524,564. Unimin Corporation's book net worth at the end of 1977 was $10,264,914, and at the end of 1978, due to the profits in 1978 and a large infusion of additional capital which occurred in December 1978, Unimin's net worth was $19,274,320.

While the Winchester and Western Railroad Company is in fact the lessee of these 323 cars, when one looks at the whole picture, the State of Virginia had almost no contact with the rail cars whose tax is disputed. As indicated earlier, the disputed rail

cars traveled regularly to and from locations in New Jersey, Illinois and Minnesota, and never went into Virginia at all. In addition, those cars were owned not by Winchester and Western Railroad Company, but by either First Security State Bank, a Utah corporation with its principal place of business in Utah, or by Merrill Lynch Leasing Inc., a Delaware corporation with its principal place of business in New York. That Utah bank owned the rail cars for the benefit of a California trust and a Minnesota corporation.

The more significant contact with the cars was the contact by Unimin Corporation. The cars were acquired in order to benefit Unimin Corporation in its shipment of silica sand. The cars were leased solely based upon Unimin Corporation's credit worthiness in

making the lease payments. Unimin Corporation, as indicated earlier, is a Delaware corporation with its principal place of business in Connecticut.

I have already given testimony showing which particular cars traveled to and from the Unimin Corporation and Unisil Corporation plants in Illinois, New Jersey and Minnesota in each of the year 1981 and 1982, and the frequency of their travels. I will now give testimony concerning the routes that they traveled.

Based upon Unimin Corporation's regular business records, as well as Applicant's Exhibit Nos. 1 through 16, Unimin personnel under my direction have prepared lists for each of the five Unimin Corporation or Unisil Corporation plants outside the State of Virginia relevant to this case showing

the following information: First, each customer and destination which was shipped by rail in the years 1981 or 1982, with a limitation which I will describe shortly; second, the rail carriers over whose lines the shipments traveled, and, if the shipments traveled on more than one rail line, the interchange points from one railway to another railway; third, the states through which the shipment traveled to reach its destination; fourth, the tons shipped thusly in 1981; and fifth, the tons shipped thusly in 1982. The one limitation is that in the case of the plants located in Dividing Creek, New Jersey, Utica, Illinois and Ottawa, Minnesota, these lists only include customer destinations which received at least 500 tons of silica sand in at least one of the two relevant years,

1981 and 1982. The lists for the Unisil Corporation plant in Millville, New Jersey and for the Unimin Corporation plant in Kasota, Minnesota include all rail shipments.

I present as Applicant's Exhibit No. 36 such a list prepared for Unimin Corporation's plant in Ottawa, Minnesota. I present as Applicant's Exhibit No. 37 such a list prepared for Unimin Corporation's plant in Kasota, Minnesota. I present as Applicant's Exhibit No. 38 such a list prepared for Unimin Corporation's plant in Utica, Illinois. I present as Applicant's Exhibit No. 39 such a list prepared for Unimin Corporation's plant in Dividing Creek, New Jersey. I present as Applicant's Exhibit No. 40 such a list prepared for Unisil Corporation's plant in Millville, New Jersey. I present as

Applicant's Exhibit No. 41 a list of rail carrier abbreviations used in Applicant's Exhibit Nos. 36 through 39.

As I have mentioned, in these lists I have excluded locations which did not purchase as much as 500 tons in either of the two relevant years. In order to get a perspective on what has been excluded as a result of this cut off, I present as Applicant's Exhibit No. 42 a list entitled "Percentage of Tons of Silica Sand Sold to Customer Locations Which Purchased at Least 500 Tons of Sand During the Relevant Year". This Applicant's Exhibit No. 42 shows for each of the plants of Ottawa, Minnesota, Utica, Illinois and Dividing Creek, New Jersey, broken down separately for the years 1981 and 1982, the percentage of all tons of silica sand sold represented by sales to

customer locations which purchased at least 500 tons during the relevant year. As shown in Applicant's Exhibit No. 42, customer locations purchasing at least 500 tons represented 99% of the total tons sold during each year at the Utica, Illinois and Dividing Creek, New Jersey plants, and 96% and 95% of the total tons sold at Ottawa, Minnesota during 1981 and 1982, respectively. Therefore, it is quite clear that the very small customers whose routings were not shown on Applicant's Exhibit Nos. 36, 38 and 39 represented a very insignificant portion of the shipments to customers. The rail routes shown on Applicant's Exhibit Nos. 36 through 40 are the routes which were traveled by Winchester and Western Railroad Company cars in 1981 and 1982. Those cars

regularly traveled from a Unimin Corporation or Unisil Corporation plant in New Jersey, Minnesota or Illinois to one of the customer locations indicated on Applicant's Exhibit Nos. 36 through 40, then returned to a Unimin Corporation or Unisil Corporation plant in the same state, and then hauled another load of silica sand to the same customer location or to one of the other customer locations which, in almost all cases, has been specified in the Applicant's Exhibit Nos. 36 through 40.

Therefore, as demonstrated by the information contained in Applicant's Exhibit Nos. 36 through 40, the Winchester and Western cars based in Minnesota, Illinois and New Jersey traveled on fixed and identifiable routes through states which have been

determined and introduced into evidence.

As shown in Applicant's Exhibit Nos. 36 through 40, none of the routes traveled passed through the State of Virginia. None of the customers of the Unimin Corporation or Unisil Corporation plants in New Jersey, Illinois or Minnesota, including the very smallest customers, were located in places which involved passage of rail cars into or through the State of Virginia.

In summary, all the Winchester and Western freight cars shown on Applicant's Exhibit No. 19 were based in the states identified in that exhibit and traveled to and from Unimin Corporation or Unisil Corporation plants in those states, on routes to customers and through states almost

completely identified in Applicant's Exhibit Nos. 36 through 40.

I present as Applicant's Exhibit No. 43 a sheet entitled "Rail Cars in Virginia". This exhibit lists all Winchester and Western freight cars which were either used in Virginia or which sat idle in Virginia at any time during the year, shown separately for 1981 and 1982.

WHEREFORE, applicant Winchester and Western Railroad Company respectfully submits the amended prepared testimony of David L. Williams.

WINCHESTER AND WESTERN
RAILROAD COMPANY

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